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Summary record of the 13th meeting
Held at Headquarters, New York, on Thursday, 21 October 1999, at 3 p.m.

Chairman: Mr. Mochochoko ..... (Lesotho)

Contents

Agenda item 158: Establishment of an international criminal court (*continued*)

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99-81800 (E)

The meeting was called to order at 3.20 p.m.

Agenda item 158: Establishment of an international criminal court (continued) (A/54/98; PCNICC/1999/L.3/Rev.1 and L.4/Rev.1)

1. **Mr. Mekprayoonthong** (Thailand) said that, important as it was to put an end to impunity for perpetrators of the most serious crimes causing concern to the international community, the Elements of Crimes and the Rules of Procedure and Evidence being drafted by the Preparatory Commission for the International Criminal Court, would be a crucial yardstick by which his country would determine whether it was feasible for it to assume obligations under the Rome Statute of the International Criminal Court by becoming a State party thereto. His delegation urged that the Elements of Crimes should reflect, rather than depart from, contemporary international law. If shortcomings did exist, they should be rectified in such a manner as to facilitate and not to impede the rendering of international criminal justice. Above all, the June 2000 deadline for the Preparatory Commission to discharge its mandate must be observed.

2. **Mr. Hassan** (Sudan) said he welcomed the adoption of the Rome Statute as a major step forward and noted the growing trend toward resolving disputes and conflicts by means of the law, rather than by force. He continued to support the establishment of the International Criminal Court, but acknowledged that it would not be easy for the Preparatory Commission to complete its task. In that connection, the first obstacle to be overcome concerned the crime of aggression, which should be included within the jurisdiction of the Court without the conditions currently stipulated. Concerning the role of the Security Council in that regard, a satisfactory formula could be found by ensuring that the Council did not overlook any instances of blatant aggression for political reasons. As for the definition of the crime of aggression, it should be remembered that aggression was mentioned in the Charter of the United Nations, and that the General Assembly had adopted the Definition of Aggression (resolution 3314 (XXIX)), which was adequate for the purposes of international legal instruments and provided a solid foundation on which to build. He commended the decision of the Chairperson of the Preparatory Commission to establish a working group to settle the issue of including the crime of aggression within the jurisdiction of the Court without conditions; failure to do so would be to ignore the lessons of history.

3. The second obstacle to be overcome concerned the Elements of Crimes. The elaboration of those Elements was simply a means of clarifying and interpreting crimes and should not involve any amendment of the Rome Statute. The principle of ensuring that criminals did not escape with impunity for war crimes, crimes against humanity and genocide should not be applied selectively on the basis of State or nationality. His country advocated recourse to the law in all cases without exception and thus fully supported the establishment of a criminal system that would provide reassurance to the human race and dissipate its fears concerning international crimes and their consequences.

4. **Mr. Enkhsaikhan** (Mongolia) said that the Preparatory Commission had made significant progress, especially in the elaboration of the draft Rules of Procedure and Evidence and the Elements of Crimes. The importance of establishing the International Criminal Court was evident, as had been underlined by recent proceedings in the General Assembly and the Security Council, and the successful completion of the Preparatory Commission's work in the near future would further accelerate the process of signing and ratifying the Statute. The creation of a viable and credible Court would substantially enhance deterrence of the most heinous international crimes such as genocide, crimes against humanity, war crimes and crimes of aggression and would send a strong message to potential perpetrators of such crimes.

5. With regard to the Rules of Procedure and Evidence, it was important to strike a balance between the rights of victims and those of suspects and the accused, to enable justice to be carried out while protecting basic human rights. As to the Elements of Crimes, it would be desirable to clarify, as far as possible, those crimes that were not sufficiently defined in the Statute. In that context, his delegation welcomed the Commission's decision to establish a working group on crimes of aggression, which his delegation had long considered should be clearly defined and reflected in the Statute. He hoped that the working group would be able to complete the task before the deadline of June 2000. The Commission as a whole should be given the high priority that it deserved in the allocation of both time and resources. The international situation was such that the speedy creation of the Court — for which the international community had waited almost half a century — was appropriate. A third three-week session for the Commission in 2000 should therefore not be ruled out. Inter-sessional meetings should also be considered, if they were necessary.

6. The official translation of the Statute into Mongolian was near completion. The Government intended to sign the Statute in the near future and present it for consideration to Parliament. There was a good chance that the Statute would be ratified in the not too distant future.

7. **Mr. Gao Feng** (China) expressed his satisfaction with the progress achieved thus far in formulating the two essential instruments necessary for the functioning of the Court, namely the Elements of Crimes and the Rules of Procedure and Evidence, a process in which his Government had actively participated. The constructive cooperation shown by the members of the Preparatory Commission was undoubtedly conducive to the early completion of both instruments. In formulating the Elements of Crimes, the provisions of the Rome Statute concerning the crimes under the jurisdiction of the Court should be fully respected in both letter and spirit. Similarly, in accordance with the principle of *nullum crimen sin lege*, the elements which constituted crimes under the jurisdiction of the Court should be described in accurate terms. The instrument should also reflect the Court's purpose of suppressing the most serious international crimes. Only by adhering to those principles would the instrument enjoy universal acceptance. The Rules of Procedure and Evidence should be both comprehensive and flexible with a view to harmonizing different legal systems and rules, as any irrational provisions could create a serious imbalance in the rights and obligations of the parties concerned, thus running counter to the purposes of the Court.

8. He supported the establishment of a working group on the crime of aggression, which was one of the most serious international crimes. In view of the sensitive legal and political issues involved, any definition of that crime should reflect the role of the Security Council and adhere to the Charter of the United Nations. In conclusion, he supported the request to extend the time available to the Preparatory Commission in order to enable it to complete its onerous task, a process, in which his delegation would continue to play an active part.

9. **Ms. Willson** (United States of America) reaffirmed her Government's position regarding the Rome Statute, which remained unchanged since her delegation's statement contained in A/C.6/53/SR.9, paragraphs 52-63. Her Government supported the establishment of a properly constituted court that would bring to justice perpetrators of the most serious criminal violations of international law, but the Statute, as it stood, was flawed and risked undermining the goals it aimed to advance. The Court's inadequate jurisdictional safeguards — especially as applied to nationals of States that had not acceded to the Statute — might inhibit responsible international military efforts in support of humanitarian or peacekeeping objectives. For that reason, her Government could not sign the Statute, which would become a mere rhetorical milestone in international relations unless it confronted the reality of how the international system must function if peace, security and human rights were to have a lasting chance.

10. During the first two sessions of the Preparatory Commission, her delegation had held frank and useful discussions with other delegations and hoped that progress could be made. Its objective was to strengthen the Statute so as to develop a regime which her Government could embrace and for which it could provide strong diplomatic, investigative and enforcement support.

11. Her Government could not recognize the Court's competence in bringing prosecutions against United States personnel engaged in official actions, if the Government was not a party to the Statute. At the same time, her delegation was optimistic that its fundamental concerns would be addressed. With that in mind, she offered the following specific comments.

12. In the view of her delegation, which had participated actively in the negotiations on the Elements of Crimes and on the Rules of Procedure and Evidence, the seven groupings of war crimes incorporated in the rolling text of the Elements of Crimes (PCNICC/1999/WGEC/RT.4-10) were satisfactory and merited the support of all delegations. Her delegation also looked forward to any inter-sessional work that might still be arranged in respect of the elements of crimes against humanity.

13. Her delegation believed that there existed a basis for resolving differences over the war crime defined in article 8 (2) (b) (viii), namely the transfer by an Occupying Power of parts of its own population into the territory it occupied. The elements of the crime, which no one sought to amend, should reflect customary international law and the common sense of the Governments engaged in critical negotiations for lasting peace in the Middle East. Otherwise, ill-conceived elements would become a further obstacle not only to the viability of the Statute but also to the peace process. History would condemn any strategy designed to involve that crime in a political agenda. The only credible course of action was to incorporate into the elements well-known principles of international law and then articulate exceptions that were a matter of common sense and recognized in the Geneva Conventions and elsewhere.

14. The negotiations for the Rules of Procedure and Evidence had advanced considerably and there was ample experience with the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda that could inform the Working Group's efforts. With regard to Part 5 of the Statute, regarding investigation and prosecution, her delegation continued to feel concern about the rules pertaining to confirmation of charges. The

function of the confirmation hearing was to determine whether there was sufficient evidence to have a trial. It was not appropriate for the Pre-Trial Chamber at that preliminary hearing to review all the evidence and hear extensive witness testimony. Such a procedure could render the actual trial under Part 6 largely superfluous. The rules should require greater precision with regard to how the confirmation hearing would function and how evidence was introduced by the parties.

15. Regarding Part 6, she expressed the hope that all delegations would work hard at the next session to resolve outstanding differences regarding the rule for evidence in cases of sexual violence. She also hoped that the draft provision on privilege would gain the support of all delegations. As for provisions relating to victims, she encouraged all delegations to approach the important needs and rights of victims with common sense and the recognition that the purpose of the Court was to dispense justice. To entitle victims to intervene might adversely burden or slow down the proceedings.

16. The question of the crime of aggression should also be resolved. There were critical issues under the Charter of the United Nations that must be examined by Governments. The easier path towards an acceptable definition of aggression would have to recognize limitations imposed by the Charter, as well as practical limitations reflecting the need for the international community to respond to humanitarian and other crises without being harassed or, much worse, being charged with violations of the Statute.

17. Her Government was engaged with other Governments on issues of great importance that had to be resolved before it could consider signing the Rome Statute. There was much at stake and she solicited the Committee's support in resolving the substantial problems that remained.

18. **Mr. Korzachenko** (Ukraine) said he was pleased to inform the Committee of his Government's recent formal decision to sign the Rome Statute. He noted with satisfaction the coherent efforts undertaken within the Preparatory Commission, which had led to substantial progress in elaborating the Rules of Procedure and Evidence and the Elements of Crimes. In that connection, he stressed the importance of safeguarding the integrity of the letter and spirit of the Statute as a guiding principle of the Commission's work with a view to ensuring that neither instrument conflicted with the Statute. Nor should the strict deadline of 30 June 2000 distort the Commission's work methods, particularly during the final stages.

19. His delegation attached great importance to elaborating the definition and elements of the crime of aggression, without which the Rome Statute would be incomplete. On that score, efforts should be intensified to strike a balance between national positions and the achievement of a generally acceptable definition of the crime of aggression, which was the most serious of all international crimes. The decision to establish a working group in that connection would give additional impetus to those efforts. He reiterated his Government's commitment to the ongoing work to establish the Court and felt confident that sufficient political will would be demonstrated to enable that process to be finalized.

20. **Mr. Sergiwa** (Libyan Arab Jamahiriya) said that, despite having endured seven years of sanctions unjustly imposed on political rather than legal grounds, his country had supported the efforts to establish an international criminal court. To that end, it had participated in good faith in the work of the Preparatory Commission and was currently considering the matter of acceding to the Rome Statute. It had also organized various seminars providing an introduction to the Court and its jurisdictions. Noting that gaps in the Rome Statute had prevented its adoption by consensus, he said he had hoped that the Court would be neutral, objective and independent. Instead, however, the Security Council, a political body, was authorized to refer cases to the Court. In other words, permanent members of the Security Council would be in a position to thwart the role of the new Court by exercising their influence and using their power of veto to hinder its work.

21. He had also hoped that the interests and legitimate rights of all States would be taken into consideration in the Rome Statute. On the contrary, however, serious crimes such as drug trafficking, the use of nuclear weapons and terrorism had not been included within the Court's jurisdiction. Inclusion of the crime of aggression would depend on the formulation of an agreed definition of that crime, which should cover the widest aspects of the crime, including the many possible instances constituting violations of the laws and rules governing war.

22. He hoped that the United Nations would offer sufficient support to enable the Preparatory Commission to meet the deadline for the completion of its onerous task of elaborating, *inter alia*, the instruments concerning the Rules of Procedure and Evidence and the Elements of Crimes. He also hoped that the trust fund established to enable the least developed countries to participate in the Preparatory Commission would continue, together with the voluntary contributions to the fund and all other means of facilitating the Commission's work with a view to the timely completion of its work.

23. **Mr. Zellweger** (Observer for Switzerland) said that the Rome Statute was one of the most important developments in international law in modern times. Although not without shortcomings, it provided an extraordinary opportunity to deal with those responsible for the most serious international crimes. His delegation was determined to work for its implementation and, in particular, to safeguard its integrity. Of course, some clarifications remained to be made and some lacunae rectified. It would, however, be a mistake to reopen discussions held at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court or to attempt to restore ideas that had already been rejected. It was the task of the Preparatory Commission to reinforce the positive results of the Conference. His delegation was gratified that that view was shared by most of the States participating in the Commission.

24. With regard to the Elements of Crimes, his delegation was, on the whole, satisfied with the progress made. It welcomed the spirit of compromise and cooperation that had reigned, giving rise to the hope that the remaining obstacles could be cleared with equal ease. The final agreement on Elements of Crimes could not, and should not, however, be the cause of, or pretext for, weakening humanitarian law in any way.

25. With regard to Rules of Procedure and Evidence, his delegation welcomed the considerable progress made, particularly in the important areas of the protection of both victims and witnesses. There had been a clear wish to formulate precise and complete rules, but it was not for the Preparatory Commission to produce a complete code of procedure: the Rome Statute was already too detailed. It would be more appropriate to complement the Statute by a subsidiary Regulation, thus creating an instrument that would ease the difficult task of the future Court. The Commission must concentrate on the essentials. The deadline of 30 June 2000 was approaching fast. The Commission could not in any case foresee all possible procedural eventualities and the Court's procedures would inevitably be different from those of internal legislations. It was therefore essential for it to have sufficiently flexible rules of procedure. If held in a straitjacket, it would not be able to function.

26. Enormous demands had been placed on the Commission by resolution F of the Conference. In addition to the Elements of Crimes and Rules of Procedure and Evidence, six other draft instruments were to be prepared before the entry into force of the Statute, which would take place soon, it was to be hoped. The fact that the Conference had not fixed a date for the six drafts did not mean that they were less important or easier to elaborate. For that reason, a timetable should be drawn up for the Commission's work after 30 June 2000 and work should start on the draft instruments as soon as possible. In particular, it was important that the funding of the Court should be clarified as soon as possible. Perhaps national parliaments could consider the matter during the process of ratification. Above all, it was imperative that the Court should be truly independent; that included independence of those who financed it. The financial basis of the Court should therefore be assured in the short and the long term.

27. Although the Court would enter into force after 60 ratifications, all States had the responsibility to ratify if the Court was to be universal. Nor should ratification be taken lightly: safeguarding the integrity of the Statute also meant taking seriously the principle of complementarity. The establishment of the Court would not relieve States of their legal obligations arising out of international humanitarian law to prevent or prosecute international crimes. Moreover, in order to fulfil their obligations under the Statute, States could be called on to change their domestic legislation. His delegation therefore believed that it was important not only that the 60-ratification threshold should be crossed but that all ratifications should be accompanied by the necessary domestic adaptations. Only then could the Court function in accordance with the Statute.

The meeting rose at 4.25 p.m.

· United Nations A/C.6/54/SR.14

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Summary record of the 14th meeting
Held at Headquarters, New York, on Friday, 22 October 1999, at 3 p.m.

Chairman: Mr. Mochochoko ..... (Lesotho)

Contents

Agenda item 158: Establishment of an international criminal court (*continued*)

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99-81830 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 158: Establishment of an international criminal court (*continued*) (PCNICC/1999/L.3/Rev.1, L.4/Rev.1 and L.4/Rev.1* (French only); A/54/98)

1. **Mr. Wenaweser** (Liechtenstein) said that the adoption of the Statute of the International Criminal Court had been a historic step and welcomed the good results achieved during the first two sessions of the Preparatory Commission. Nevertheless, further effort would be required to meet the deadline of June 2000 for the finalization of work on the Elements of Crimes and the Rules of Procedure and Evidence. Continued high priority should also be given to the International Criminal Court process.

2. Progress had been achieved in a professional and businesslike atmosphere, as compared with the emotionally charged climate of Rome, possibly a sign of an evolving broader acceptance of the Statute. The deficiencies of some provisions were irrelevant when compared to the unique achievement of the Statute as a whole, and its integrity should be maintained. The Rules of Procedure and Evidence and the Elements of Crimes should not therefore restrict the Court's ability to interpret applicable international law in accordance with the letter and spirit of the Statute.

3. The most important expression of political support for the Court was the signature and ratification of the Statute. Its early entry into force was a major goal, and the developments thus far were encouraging. Ratification of the Statute was a complex process which would be a considerable burden for many Governments. Liechtenstein had signed the Statute when it had been opened for signature in Rome and hoped to complete the ratification process by the end of 2000.

4. One important characteristic of the Statute was its preventive potential. The long unchallenged practice of impunity had suffered a number of major and welcome setbacks in the recent past, and an effective International Criminal Court would be the most important contribution to terminating it. It was increasingly understood that the root causes of armed conflicts — particularly internal ones — were complex and could include patterns of violations of human rights and crimes such as those dealt with in the Statute. Thus the prevention of such conflicts was not only the most efficient, but sometimes the only viable, way to deal with situations that threatened international peace and security. Seen in that context, the International Criminal Court was of unique importance, and its early realization was a collective responsibility for all.

5. **Mrs. Semambo-Kalema** (Uganda) drew attention to the advances in the progressive development of international law that had been achieved on the threshold of the new millennium and said that the adoption of the Statute of the International Criminal Court had been a major milestone. The establishment of the Court would go a long way to ensuring that those who committed grievous crimes against humanity did not escape punishment, thereby reaffirming the rule of law. She looked forward to the time when heinous crimes in addition to crimes against humanity, genocide and war crimes would be brought under the Court's jurisdiction.

6. The work to bring the long-desired Criminal Court into operation was scheduled for completion by 30 June 2000. Her delegation attached great importance to the work of the Preparatory Commission, which sought to accommodate various legal systems, and believed that adequate time and resources should be allocated to the Commission to enable it to continue its work.

7. As the Preparatory Commission carried out its work, States should recall their obligation to sign and ratify the Statute, since neglecting to do so would mean that their efforts had been wasted. Although 88 States had signed the Statute, only four had ratified it to date, and 60 ratifications were required for its entry into force. Uganda had signed the Statute on 17 March 1999 and was working to complete the internal procedures for its ratification, and she urged other States that had not yet done so to do likewise. Her delegation had participated in the briefing sessions on ratification and implementation legislation hosted by the International Human Rights Law Institute of De Paul University and Parliamentarians for Global Action on 31 July and 7 August 1999 at United Nations Headquarters and had found them to be very useful.

8. She thanked those countries that had contributed to the trust fund established to facilitate the participation of the least developed countries in the work of the Preparatory Commission. Her delegation pledged its continued support to the Preparatory Commission as it discharged its mandate and hoped that the spirit of cooperation and understanding demonstrated during the Rome Conference would continue to prevail.

9. **Mr. Adamhar** (Indonesia) said that the post-cold-war period had contributed to an escalation of tension and had paved the way for the emergence of ethnic nationalism in a fragile nation. Violent and grievous crimes continued to plague the global scene, and national judicial systems and international cooperation had often been insufficient to deal with them.

10. It was to be hoped that the International Criminal Court would be a permanent judicial mechanism to ensure the advancement of justice at the international level. Indonesia had actively participated in the entire preparatory process, including both sessions of the Preparatory Commission, and was continuing its careful consideration of the Statute, which it hoped to disseminate to the entire Indonesian population.

11. Universal participation should be the cornerstone of the Court so that it would not fall prey to narrow political agendas. The Court should be a product of mutual cooperation among all nations regardless of differences in political, economic, social or cultural systems. Equally important was the need to observe the precepts embodied in the Charter of the United Nations, including consent, impartiality, non-discrimination, State sovereignty and territorial integrity. International law was based on the will of sovereign States to develop binding legal rules to govern inter-State relations, but such norms could only be binding when States gave their consent to be bound.

12. The principle of complementarity was of paramount importance, as the Court was intended to supplement and not supplant national jurisdiction. It should therefore exercise jurisdiction only with the consent of the States concerned, and refrain from handling cases that were already before national courts. The Court must not become a mechanism for interfering in State's internal affairs but should fulfil its central objective of facilitating international cooperation and deterring the perpetration of heinous acts. To function, the Court must have a clear understanding of what constituted a specific crime, and he therefore supported the convening of working groups to reach a consensus on the definition of aggression and related issues.

13. Indonesia hoped that the work of the Preparatory Commission would be carried out in a spirit of cooperation and pragmatism. The adoption of the Statute should not be a reason to disregard the concerns of States that had not yet signed and ratified it.

14. **Ms. Pipan** (Slovenia) said that the adoption of the Statute had been a historic breakthrough in international law. The International Criminal Court would be an essential pillar of an emerging system of international justice and a powerful tool to address and deter the commission of serious crimes against humanity. The Court's complementary nature would provide an incentive for States to honour their commitments and obligations under international law. However, further steps had to be taken to fulfil the mandate of the Rome Conference. Despite the complexity of the issues under consideration by the Preparatory Commission, she hoped that the States would continue to work efficiently and effectively in a spirit of compromise to achieve those objectives.

15. An internationally agreed definition of the crime of aggression in the Statute would make the Court's jurisdiction complete and offer a powerful deterrent to the illegitimate use of force by States. She therefore welcomed the Preparatory Commission's decision to establish a working group on the crime of aggression.

16. Completion of the Rules of Procedure and Evidence and the Elements of Crimes must go hand in hand with efforts to universalize acceptance of the Court. For Slovenia, ratification of the Statute was an important human rights priority and an internal legislative procedure was taking place to ensure the compatibility of the Court's Statute with the Slovenian Constitution. Once ratified, the Statute would have direct applicability in the Slovene legal system, owing to the constitutional principle of the supremacy of international law. The necessary implementing legislation would be adopted after ratification had taken place and the Penal Code would be amended to bring it fully in line with the Statute as well as current international humanitarian law standards. As many States shared similar concerns relating to ratification procedures, she welcomed the regional conferences and workshops that had been held on that subject.

17. **Mr. Kuindwa** (Kenya) said that the adoption of the Rome Statute had been a milestone in the progressive development of international law. It was particularly encouraging that 89 countries, including Kenya, had already signed that instrument, and he urged those countries that had not yet signed it to do so. Kenya was taking the necessary steps for early ratification, and hoped that other delegations would do the same.

18. Kenya's experience in cooperating with the International Criminal Tribunal for Rwanda had shown that it was possible to cooperate with such a court even without major changes in legislation. He therefore foresaw no major problem in Kenya's ability to cooperate with the International Criminal Court. His delegation recognized the necessity of establishing a forum where perpetrators of crimes which adversely affected not only the warring factions but also neighbouring countries could be brought to justice.

19. At its most recent session the Preparatory Commission had completed less than half of its work. Additional meetings should therefore be scheduled in order to allow the Commission to complete its work by the deadline of June 2000. It was essential to complete both the Rules of Procedure and Evidence and the Elements of Crimes, giving

priority to the definition of the crime of aggression, which was relevant to the very spirit of the Statute. A compromise solution on that sensitive issue could surely be worked out without eroding the core of the crime itself. All those issues should be dealt with as soon as possible in order to create an atmosphere conducive to universal acceptance of the Statute.

20. He appealed to the relevant non-governmental organizations to extend their support to Kenya's subregion so that political, moral and social will could be mobilized in support of early ratification of the Statute. He also appealed to the developed countries and others to contribute to the trust fund to ensure the participation of the least developed countries in the work of the Preparatory Commission.

21. **Mr. Ogonowski** (Poland) said that adoption of the Rome Statute had greatly reinforced the existing system of safeguards against the abuses of universal legal norms. As the end of a century that had witnessed unprecedented human suffering approached, the need to develop a new culture characterized by respect for the rule of law was more apparent than ever, given that the world continued to witness widespread violations of legal norms and standards.

22. The signature of the Statute by nearly 90 States, including Poland, was encouraging. Ratification was a more complex process, however, and Poland was currently analysing the Statute in order to identify any provisions that would require changes in the country's domestic legal system. The Polish Criminal Code already contained specific provisions relating to genocide, aggression, crimes against humanity and war crimes.

23. The significant progress made by the Preparatory Commission was reassuring, and the goal for completion of the work on the Rules of Procedure and Evidence and the Elements of Crimes seemed to be within reach. The Commission should hold two three-week sessions in 2000 prior to the June deadline and one thereafter to begin work on other documents. One difficult task would be to consider the definition of aggression and the terms of the Court's jurisdiction over that crime. A clear message should be given that aggression was prohibited by international law and was also a punishable crime, as it frequently preceded the commission of other serious crimes prohibited by international law. Ad Hoc tribunals did not play a preventive role. His delegation hoped that the discussion on the matter would be solely of a legal nature.

24. The Statute's effectiveness would largely depend on the level of support received from the international community, and efforts should continue to ensure the widest possible participation, while maintaining the integrity of the Statute.

25. **Mr. Bakoniarivo** (Madagascar) said it was generally acknowledged that the adoption of the Statute had required compromises of all States. He therefore welcomed the constructive atmosphere and spirit of cooperation that had marked the debate in the Preparatory Commission. Despite the difficulty inherent in harmonizing the requirements of different legal systems, much progress had been made, although much still remained to be done. He urged delegations to continue to endeavour to accommodate the concerns of others.

26. Given the June 2000 deadline, completion of work on the Rules of Procedure and Evidence and on the Elements of Crimes constituted the major challenge before the Preparatory Commission. The international seminar held in Paris on victims' access to the Court and the inter-sessional meeting at Siracusa, Italy, were valuable in furthering the Commission's work.

27. For some States, ratification of the Statute was dependent on the adoption of a definition of the crime of aggression. That matter and all other outstanding issues must therefore be settled by the scheduled deadline. He welcomed the many proposed definitions that had been submitted by States and believed that a working group should be established to consider them, taking as its basis the definition contained in General Assembly resolution 3314 (XXIX).

28. He expressed his delegation's appreciation for the assistance provided to enable the least developed countries to participate in the work of the Preparatory Commission.

29. While Madagascar was firmly committed to the establishment of the International Criminal Court, it faced legal and constitutional problems that must be resolved before it could ratify the Statute. His Government was giving serious consideration to the possibility of revising the Constitution in order to make that possible, and he encouraged other States that had not yet signed or ratified the Statute to do so as soon as possible.

30. **Ms. Ramoutar** (Trinidad and Tobago), speaking on behalf of the States members of the Caribbean Community (CARICOM) that were members of the United Nations, welcomed the broad participation of the international community in the work of the Preparatory Commission and the constructive manner in which the Commission had proceeded during its first two sessions. The international seminar on victims' access to the Court and the inter-sessional meeting at Siracusa, Italy, had been helpful in advancing the work of the Commission.

31. In March 1999, legal experts from 10 CARICOM member States had met in Port-of-Spain at the Intergovernmental Regional Caribbean Conference for the signature and ratification of the Rome Statute of the International Criminal Court. Implementation legislation and ratification procedures had been discussed and Conference participants had declared their commitment to ensuring the integrity of the Statute and to pursuing ratification in their respective States within the shortest possible time. While internal parliamentary procedures for signature or ratification were frequently lengthy, they were nevertheless under way in several Caribbean States, and she encouraged all States that had not yet signed or ratified the Statute to endeavour to do so as early as possible.

32. **Mr. Traore** (Burkina Faso) commended the reports on the work of the Preparatory Commission.

33. His delegation hoped that the rules that would guide the Court's functioning would never be misused in the way that some other instruments of international law had been used by some States. The creation of a supranational jurisdiction should not target criminals in some States while ignoring those in others; court judgements must be applicable to criminals from all countries. Furthermore, the Elements of Crimes must not include any descriptions or wording that was inconsistent with the fundamental rules of international law. If a group of States sought to appropriate the Court for its own use, the efforts of the international community would have been in vain.

34. While his delegation fully supported the establishment of the Court, it did not expect that that institution would be able to solve all problems. A disturbing phenomenon of particular concern in that connection was the arms trade, and his Government believed that those who grew rich from trading in weapons or other means of perpetrating genocide must be classified as criminals.

35. His delegation was also concerned by efforts to prevent the Preparatory Commission from defining the crime of aggression, the most serious of all crimes. The elements of such a definition were already contained in the general principles of international law, and that task must be tackled as a matter of priority.

36. If the rules governing the court were not established in a positive spirit, their ultimate impact would be considerably reduced. As ancient African societies well knew, rules did not lead to a better world if their underlying spirit was not positive. His delegation was also concerned that the Statute should be universal. However, universality was difficult to achieve given the existence of several different legal systems. The Preparatory Commission should therefore take the time needed to ensure that consensus was reached.

37. **Mr. Kanu** (Sierra Leone) said that his delegation had originally not intended to make a statement on the agenda item, as its position on the establishment of the International Criminal Court was well known. However, on the previous day, a new Cabinet had been formed in his country which included representatives of former rebel groups, all political parties and civil society as well as individuals with no party allegiance. While it was widely known that the rebel groups in Sierra Leone had committed atrocities, the inclusion of those groups in the new Government did not imply support for those acts. It was thus in the light of that development that his delegation wished to address the Committee.

38. African civilians continued to bear the brunt of war crimes, genocide and crimes against humanity. The international community's efforts to make the International Criminal Court a reality were therefore to be welcomed. His delegation was aware of the herculean tasks that lay ahead and, in the light of experience in Sierra Leone, had strong views concerning the definition of the crime of aggression. Nevertheless, it would not allow emotion to stand in the way of any consensus or compromise that might be reached on that subject, but looked forward to cooperating with the working group in a constructive manner.

39. States had a legal, moral and political imperative to support the early establishment of the Court, and he urged all delegations to impress on their Governments the need to sign and ratify the Statute in order to send a clear message to the perpetrators of heinous crimes such as those witnessed in his own country that they could no longer hide with impunity. While his Government had thus far been prevented from ratifying the Statute because of repeated rebel invasions, the arrival of peace in the country had made that step possible.

40. **Mr. Chowdhury** (Bangladesh) said that his delegation was participating in the work of the Preparatory Commission in the conviction that the International Criminal Court would promote human rights all over the world, although it must be universally accepted and have independent authority to enforce its verdicts if it was to be effective. Bangladesh attached particular importance to the Court because the country had been the victim of genocide during its war of liberation in 1971.

41. The Prime Minister of Bangladesh had personally signed the Statute in New York one month previously and had indicated her country's commitment to the principles of the Court. The Government of Bangladesh had embarked upon the ratification process, which raised difficult technical

and legal issues. Bangladesh and other least developed countries might well require technical cooperation to complete the ratification process and to implement the Statute in the future, and his delegation was grateful to those delegations that had offered to share their expertise in the area of implementation legislation.

42. He expressed satisfaction with the work of the first two sessions of the Preparatory Commission and thanked the contributors to the trust fund which had enabled least developed countries to participate in the Commission's work. However, the trust fund was now depleted, thus preventing universal participation in the establishment of a court.

43. With regard to the Preparatory Commission's future work, his delegation believed that the Rules of Procedure and Evidence and the Elements of Crimes must respect the letter and spirit of the Rome Statute to ensure the effective functioning of the Court. The Elements of Crimes should contain clear definitions and take international humanitarian law into account. He welcomed the decision to establish a working group on the crime of aggression, which was a serious violation of the principles of the Charter of the United Nations.

44. There was a need for dissemination of information on the Statute and the work of the Preparatory Commission. In that connection he recognized the important ongoing role played by the NGO Coalition for the Establishment of an International Criminal Court, whose efforts would be important in securing the ratifications needed for the Court to become operational.

45. **Ms. Todorova** (Bulgaria) said that her delegation aligned itself with the views expressed by the representative of Finland on behalf of the European Union. As an associated country, Bulgaria shared the commitment of European Union member States to the early entry into force of the Rome Statute of the International Criminal Court, which would confirm the international community's commitment to the rule of law as a means of ensuring peace and security and of punishing and preventing the crimes falling within the Court's jurisdiction.

46. Bulgaria had signed the Statute on 11 February 1999; however, ratification would depend on legislative changes in the Bulgarian Criminal Code and Code of Criminal Procedure. While existing provisions of the Criminal Code conformed to a great extent with the provisions of the Rome Statute, total conformity was required. It was expected that all the necessary changes could be made by the end of the year 2000.

47. Her delegation attached great importance to the work of the Preparatory Commission on the Rules of Procedure and Evidence and the Elements of Crimes. It welcomed the significant results produced during the Commission's first two sessions and hoped that the Commission would continue its work in a spirit of compromise and understanding, in order to be able to complete it promptly.

48. **Ms. Efrat-Smilg** (Israel) said that, given the history of the Jewish people in the twentieth century, Jewish jurists and statesmen had been among the first to advocate the establishment of an international criminal court. Her delegation firmly believed that the heinous crimes referred to in the Rome Statute were a menace to all and should be dealt with by the international community as a whole.

49. Only because her delegation attached the utmost importance to the establishment of the Court had it expressed some concerns with regard to the Statute. It doubted, for example, that the crime of transfer of civilian populations, referred to in article 8, paragraph 2 (b) (viii), deserved to be ranked with some of the other genuinely heinous war crimes listed in that article. In defining the elements of that crime, it should be borne in mind that the chapeau of article 8, paragraph 2 (b), categorized it among the "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law". International law pertaining to the crime of transfer was based on article 49 of the Fourth Geneva Convention. Consequently, one necessary element of the crime should be that the transfer was in violation of that provision.

50. Moreover, the addition at Rome of the phrase "directly or indirectly" to article 8, paragraph 2 (b) (viii), of the Statute had no basis in the established framework of international law, but could only be explained as politically motivated. The phrase could not alter the nature of the offence in the context of the chapeau's requirement that it should be interpreted within the established framework of international law, nor could it change the sense of involuntariness implicit in the term "transfer" in that context. The Statute must not be abused for political ends. The Court was too important for the international community to allow it to be blemished by political agendas.

51. **Mr. Edmond** (Haiti) said that the adoption of the Rome Statute showed the international community's determination to call a halt to the reign of terror and impunity. The need for the Court was incontestable in the light of recent atrocities, yet 15 months after its adoption only 88 States had signed it and only four had ratified it.

52. Ratification of the Statute depended greatly on compatibility with national laws, which meant that some countries would have to amend their domestic legislation. His delegation welcomed the offer of the European Union to place its expertise at the service of developing countries in that regard.

53. His delegation steadfastly maintained that the Statute should always prevail over the Rules of Procedure and Evidence and the Elements of Crimes, which were to be elaborated only as accessory rules to assist the Court in interpreting the Statute. In defining the elements of crimes, his delegation was in favour of a succinct core of elements like those found in Roman and German law. Four elements were sufficient for determining the existence of an offence: a material element, a legal element, a moral element and an element of intent. A plethora of elements would merely complicate the judge's task.

54. Haiti was particularly interested in the work on defining the crime of aggression. Since no consensus had yet been reached, his delegation favoured the establishment of a working group to make recommendations on the topic and supported the idea of holding two sessions prior to the scheduled deadline of 30 June 2000 for the completion of the Preparatory Commission's work.

55. **Mr. Obeid** (Syrian Arab Republic) said that he supported the establishment of the International Criminal Court on the basis of the principle of universality of and taking into account the diverse cultural and legal backgrounds of those contributing towards its establishment. It was essential that the Court should be free of all political influences if it was to be fully independent and impartial.

56. The Rome Conference had been but the start of the process, and quality should not be sacrificed to time, since the work of the Preparatory Commission, particularly that concerning the Rules of Procedure and Evidence, the Elements of Crimes and the definition of the crime of aggression, would be a major determining factor in the decision of States to sign and ratify the Court's Statute. The aim was to ensure that the Court would try all international criminals without exception, and it was therefore crucial to remain faithful to the letter and spirit of the Rome Statute and eschew any attempts to refine or amend it.

57. Defining the crime of aggression was more important than determining the elements of crimes, since aggression constituted the basis of the other crimes over which the Court exercised jurisdiction. He hoped that the significant steps which the Preparatory Commission had taken to address the issue would facilitate a speedy resolution of the matter, as States might feel hesitant to sign and ratify the Statute, unless the crime was clearly defined. Conversely, the Court could be established without determining the elements of all crimes, which were already well known, or formulating highly detailed rules of procedure and evidence; trust should be placed in the ability of the judges of the Court to deal with unforeseen situations. A special agreement should also be concluded between the Security Council and the Court for subsequent annexation to the Rome Statute with a view to determining clearly the existence of a strong relationship between them that was devoid of political considerations.

58. The proposal which his and other delegations had submitted on the crime of aggression (PCNICC/1999/DP.11) and which had received considerable support, was built on the definition of the crime contained in General Assembly resolution 3314 (XXIX), and thus provided an excellent foundation for the achievement of an agreed definition which should cover all forms of aggression. As for the role of the Security Council, he shared the view expressed by the representative of the Islamic Republic of Iran that a mechanism was needed which guaranteed that role while simultaneously ensuring that perpetrators of aggression did not escape trial owing to the failure of the Council either to move expeditiously or to reach a positive decision if the right of veto was exercised. Although the proposal made by the representative of Cameroon was interesting, he cautioned against delay in reaching an early solution to the issues raised by the crime of aggression. Moreover, the Court should be equally empowered with the Council to determine instances of aggression, experience having shown that the Council did not always recognize such instances.

59. He expressed satisfaction at the achievements of the Working Group on the Elements of Crimes relating to war crimes and said that most delegations, including his own, attached special importance to identifying the elements of the war crime of the deportation or transfer of citizens, which was particularly relevant in the case of the occupied Arab territories. The proposal submitted on that topic by Arab delegations (PCNICC/1999/WGEC/DP.25), which had been widely welcomed, was consistent with the principles of both international law and international humanitarian law. In his view, the crime consisted of only two elements, namely the material and the moral, and any attempt to include other elements would deplete the crime of its meaning and depart from the letter and spirit of the Rome Statute. The transfer of citizens was a repugnant war crime which flagrantly violated the principles of international humanitarian law and was not confined to the occupied Arab territories. It was purely a legal matter, and he regretted that discussion of the crime had been deferred until late in the

previous session in an apparent attempt to pass it over and exert pressure on Arab States to accept a text that would serve the interests of the perpetrators of that crime. In any event, the provisions of the Rome Statute were now final and could not be amended to enable the Court to render judgements which suited certain States and individuals to the exclusion of others.

60. **Mr. Jeannet** (Observer for the International Committee of the Red Cross (ICRC)) hoped that the Rome Statute would be ratified by a large number of States and that they would refrain from exercising their right under the Statute to refuse the Court's jurisdiction for a period of seven years in respect of war crimes allegedly committed by their nationals or on their territory. For its part, ICRC would continue to develop its efforts to assist States in adopting and implementing national legislation pertaining to the prosecution of war criminals in general and to the Rome Statute in particular.

61. The utmost attention should be paid to drafting the Rules of Procedure and Evidence and the Elements of Crimes to ensure that they properly reflected existing international humanitarian law. To that end, ICRC had prepared parts of an extensive study of relevant international and national case law on the elements of war crimes. If carefully drafted, the Elements of Crimes could represent an important tool for ensuring the uniform application of the law at both international and national levels. In that connection, the highly constructive approach shown by delegations boded well for the eventual adoption of that instrument, which would undoubtedly assist the judges of the Court.

62. **Ms. Efrat-Smilg** (Israel), speaking in exercise of the right of reply, said that the statement by the representative of the Syrian Arab Republic was a clear demonstration of the dangers facing the Court and the extreme caution and restraint that would be needed to make it a success. There was no need for a new forum which would merely echo the political deliberations going on in other United Nations forums. The only rationale for the creation of the Court was that it should be an entirely new, non-politicized, type of body.

63. **Mr. Obeid** (Syrian Arab Republic), speaking in exercise of the right of reply, said that his statement had merely been a factual description of the work done in the Preparatory Commission based on the principles of international and customary law, including the Geneva Conventions of 1949 and humanitarian law. Any other implication was an invention of the previous speaker which sought to excuse the crimes of aggression and transfer being committed daily by Israel in occupied territories in the Syrian Arab Republic, Jordan and Lebanon and in the occupied Palestinian territories. His delegation was not "politicizing" but discussing the jurisdiction of the Court. The war crime of transfer of civilian populations had been identified as a serious crime not only by the Rome Statute but also by the Geneva Conventions — in other words, long before Israel had committed such a crime. The progress of the Middle East peace process was irrelevant to the work of the Preparatory Commission, and in any case had broken down on account of Israel's stubbornness. The Rome Statute had been adopted and should remain intact.

64. **Mr. Diab** (Lebanon), speaking in exercise of the right of reply, said he wished to reiterate that the Rome Statute had been definitively adopted; the task at hand was to describe the elements of the crimes it identified. The crime of transfer of civilian populations, which Israel did not consider a heinous one, continued to be committed by Israel in occupied Lebanese territory. Israeli actions had claimed many victims and caused much suffering to the people of Lebanon and had seriously damaged that country's economy. It was highly important to arrive at a legally acceptable definition of the crimes of aggression and transfer for use by the new International Criminal Court.

65. **Ms. Efrat-Smilg** (Israel), said she wished to reiterate that the Court should be a new kind of body, dedicated to noble aims, not merely another forum in which to repeat the same political debates heard elsewhere.

66. **Mr. Obeid** (Syrian Arab Republic) said it was evident that Israel was afraid to allow the International Criminal Court to have jurisdiction over the crimes it was committing in the occupied Arab territories.

The meeting rose at 5.30 p.m.

The meeting was called to order at 10.15 a.m.

Tribute to the memory of Doudou Thiam, former member, Chairman and Special Rapporteur of the International Law Commission

1. **Mr. Galicki** (Chairman of the International Law Commission) and the **Chairman** paid tribute to the memory of Doudou Thiam and expressed their condolences to the delegation of Senegal.

2. *At the invitation of the Chairman, the members of the Committee observed a minute of silence.*

3. **Ms. Diop** (Senegal) said that her delegation was deeply moved by the minute of silence observed by the Committee in honour of Mr. Doudou Thiam. The Chairman of the International Law Commission had described Mr. Thiam as its dean and memory. She could testify that he had also played that role within his country as Senegal's first Minister of Foreign Affairs and an early advocate of women's advancement. The Committee's condolences were much appreciated and would be transmitted to the Head of State of Senegal.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (A/54/10 and Corr.1 and 2, A/CN.4/493)

4. **Mr. Galicki** (Chairman of the International Law Commission), introducing the report of the Commission (A/54/10 and Corr.1 and 2), said that his statement at the current meeting would focus on chapters I to IV. Chapter I described the membership and internal structure of the Commission, and chapter II provided a brief overview of the work done by the Commission, while chapter III, in response to the request of the Sixth Committee, highlighted the issues on which the views of Governments would be particularly helpful to the Commission. In connection with the last of those issues, protection of the environment, he noted that although the Commission had requested written comments, oral comments would also be welcomed.

5. The first substantive chapter of the report was chapter IV, on the topic entitled "Nationality in relation to the succession of States". The Commission had completed its second reading of the draft articles on nationality of natural persons in relation to the succession of States, and had decided to recommend to the General Assembly the adoption of the draft articles in the form of a declaration. The texts of the draft articles, with commentaries, are reproduced in paragraph 48 of the report. The scope and application of the articles was limited to the nationality of individuals and did not extend to the nationality of legal persons.

6. The draft articles were divided into two parts: part I applied to all categories of succession of States and part II contained specific provisions applicable in four different categories of succession of States. The Commission had duly taken into account the practice of States during the process of decolonization for the purpose of the elaboration of the provisions in part I. Part II dealt with four specific categories of succession, and it was assumed that those provisions would be applicable, *mutatis mutandis*, in any remaining case of decolonization in the future.

7. The preamble indicated the *raison d'être* of the articles: the concern of the international community as to the resolution of nationality problems in the case of a succession of States. Although nationality was governed essentially by national legislation, the competence of States in that field could be exercised only within the limits set by international law. The preamble further affirmed that, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account. The sixth preambular paragraph concerned the human rights of persons whose nationality might be affected following a succession of States. The eighth paragraph emphasized the need for the codification and progressive development of international law in the field of nationality of natural persons in relation to the succession of States.

8. Article 1 was a key provision, its core element being the application of the right to a nationality embodied in article 15 of the Universal Declaration of Human Rights in the particular context of a succession of States. He noted that the article could not be read in isolation from the other draft articles and drew particular attention to paragraph (5) of the commentary.

9. With regard to article 2, on use of terms, the definitions in subparagraphs (a), (b), (c), (e) and (g) were identical to those contained in article 2 of the two Vienna Conventions on the Succession of States, whereas those in subparagraphs (d) and (f) had been deleted by the Commission.

10. Article 3, which was based on the relevant provisions of the two Vienna Conventions, explicitly limited the application of the draft articles to successions of States occurring in conformity with international law. Questions of nationality which could arise in situations such as illegal annexation of territory were not covered, but the provisions were without prejudice to the right of everyone to a nationality.

11. Article 4 referred to the prevention of statelessness, which was to be achieved by means of the application of the entire set of draft articles, and in particular through coordinated action of the States concerned.

12. Article 5 addressed the problem of the time-lag between the date of the succession of States and the adoption of legislation or the conclusion of a treaty between the States concerned on the question of nationality. It was presumed, subject to assessment in the overall context of the draft articles, that on the date of the succession of States, the successor State attributed its nationality to persons concerned who were habitual residents of the territory affected.

13. Article 6 dealt with the legislation on nationality and other connected issues, the main focus being the timeliness of internal legislation. "Connected issues" referred to the right of residence, the unity of families, military obligations, social benefits and other matters intrinsically consequential to the change of nationality upon a succession of States.

14. Article 7 provided for the retroactive effect of the automatic attribution of nationality or the acquisition thereof, provided that the persons concerned would otherwise be stateless during the period between the date of the succession of States and the date of attribution or acquisition. He drew particular attention to paragraph (3) of the commentary concerning the use of the expression "attribution of nationality".

15. Article 8 referred to exceptions to the obligation and power of the successor State to attribute its nationality.

16. Article 9 dealt with the renunciation of the nationality of another State as a condition for attribution of nationality, and article 10 with the loss of nationality upon the voluntary acquisition of the nationality of another State, without addressing the temporal element of when the loss of nationality should become effective or the question of the voluntary acquisition of the nationality of a third State.

17. Paragraph 1 of article 11 set out the requirement of respect for the will of the person concerned where such person was qualified to acquire the nationality of two or several States concerned. There was no strict obligation to grant a right of option to that category of persons, although articles 20, 23 and 26 referred to the categories of persons entitled to such a right in specific categories of succession of States. Paragraph 2 highlighted the function of the right of option in eliminating the risk of statelessness. The term "appropriate connection", which should be interpreted in a broader sense than the notion of "genuine link", had been used because the Commission attached paramount importance to the prevention of statelessness, which in the case in question superseded the strict requirement of an effective nationality. Paragraphs 3 and 4 referred to the consequences of the exercise of the right of option with regard to the obligations of the States concerned; paragraph (12) of the commentaries was of particular interest in that regard. The requirement for a reasonable time limit set out in paragraph 5 was intended to ensure an effective exercise of the right of option.

18. Article 12 dealt with the problem of family unity. While it was desirable to enable members of a family to acquire the same nationality upon a succession of States, it was not a requirement, although States had a general obligation to eliminate any legislative obstacles to families living together as a unit. The term "appropriate measures" was intended to exclude unreasonable demands on the part of persons concerned, and the Commission's views concerning the question of the concept of "family" were set out in paragraph (6) of the commentary.

19. Article 13 referred to the issue of children born to persons concerned after the date of succession of States. Such children had the right to the nationality of the State in whose territory they were born. The application of the article did not have any further limitation in time, in order to avoid statelessness.

20. Article 14 dealt with the status of habitual residents. Paragraph 2 was intended to ensure the effective restoration of the status of such residents in the specific case where the succession of States was the result of events leading to the displacement of a large part of the population. The Commission had felt that in the light of recent experience, it was desirable to address the problem of that vulnerable group.

21. Article 15 prohibited discrimination on any ground in matters of nationality in relation to a succession of States.

22. Article 16 applied the principle embodied in article 15, paragraph 2, of the Universal Declaration of Human Rights; it was intended to prevent abuses occurring in the process of the application of any law or treaty which, in themselves, were consistent with the draft articles.

23. Article 17 was intended to ensure that the procedure followed with regard to nationality matters in cases of succession of States was orderly. Article 18 dealt with the exchange of information, consultation and negotiation between the States concerned, with a view to identifying in advance the problems which might arise in the case of a succession and preventing or minimizing any negative consequences.

24. Article 19 dealt with the situation of States other than the State which had attributed its nationality. It safeguarded the right of those States not to give effect to a nationality attributed by a State concerned in disregard of the requirement of an effective link, and also required that such treatment be for the benefit of the persons concerned, and not to their detriment.

25. Part II was divided into four sections devoted to specific categories of succession of States, namely the transfer of part of the territory, the unification of States, the dissolution of a State and the separation of part or parts of the territory.

26. Section 1 of part II consisted of article 20, which applied in the case of cessions of territory between two States on a consensual basis and was based on the prevailing State practice.

27. Section 2 of part II also consisted of one article, article 21, which dealt with the attribution of the nationality of the successor State in those cases where a unification of States had occurred. The provision in article 21 reflected State practice and, in the view of the Commission, embodied a rule of customary international law.

28. Section 3 consisted of articles 22 and 23 and applied to the case of the dissolution of a State, as distinguished from the case of separation of part or parts of the territory.

29. The core body of nationals of each successor State was defined in article 22, paragraph (a), by reference to the criterion of habitual residence. Paragraph (b) set out rules for the attribution of the nationality of a successor State to persons concerned having their habitual residence outside its territory.

30. Article 23, paragraph 1, provided for the right of option of persons concerned who were qualified to acquire the nationality of two or more than two successor States. Paragraph 2 dealt with persons concerned who had their habitual residence in a third State and who were not covered by the provisions of article 22, paragraph (b).

31. Section 4 consisted of articles 24 to 26 and applied to the case of separation of part or parts of the territory. Such a case must be distinguished from the case of the emergence of newly independent States, although the substantive rules in articles 24 to 26 could be applied, *mutatis mutandis*, in any case of emergence of a newly independent State.

32. Article 25, paragraph 1, dealt with the withdrawal of the nationality of the predecessor State as a corollary to the acquisition of the nationality of the successor State.

33. Article 25, paragraph 2, listed the categories of persons concerned who were qualified to acquire the nationality of the successor State but from whom the predecessor State should not withdraw its nationality unless they opted for the nationality of the successor State.

34. Article 26 covered both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities of two or more successor States.

35. The Office of the United Nations High Commissioner for Refugees (UNHCR) had found the text prepared by the Commission to be very useful for its work. In a letter addressed to the Commission, the High Commissioner had stated that problems relating to nationality following the succession of States had been of major concern to UNHCR in the past decade, and that many of its programmes in newly independent States centred on that issue.

36. The Commission had decided to recommend to the General Assembly that, with the adoption of the draft articles on nationality, the work of the Commission on the topic should be considered concluded. In the absence of positive comments from States, the Commission had concluded that States were not interested in the study of the second part of the topic.

37. **Mr. Longva** (Norway), speaking on behalf of the Nordic countries, said that the submission of the draft articles on nationality in the form of a declaration (A/54/10, chap. IV) illustrated the Commission's ability to complete its consideration of a topic in a timely fashion. The Nordic countries were of the view that the Commission was functioning in accordance with its mandate and that it had benefited from a continuing dialogue with the Sixth Committee.

38. Referring to chapter X of document A/54/10, he said that inadequate attendance at the Commission's meetings had long been an issue of concern. The Nordic countries shared the Commission's view that split sessions might improve the situation by allowing for extended inter-sessional deliberations, thereby enhancing the productivity of the second part of a split session. It was important, however, that the report of the Commission should be issued well in advance of the Sixth Committee's meetings.

39. Further improvements depended largely on the ability of Governments to respond to the Commission's requests for written comments or for questionnaires to be completed. The resource constraints faced by smaller countries, in particular, might affect their ability to respond. The comments of

several Governments were in fact submitted during the meetings of the Committee. While acknowledging that written contributions might be more useful to the Commission, the Nordic countries were concerned that oral statements made in the Committee did not always get the attention they deserved. All opinions deserved equal consideration, regardless of the form in which they were presented.

40. Furthermore, the Commission's requests for comments by Member States should be formulated as precisely as possible. States might have more difficulty in preparing responses when the requests appeared to be too broad. It might also be productive for Governments to initiate national consultations with organizations and individual experts on international law.

41. The Nordic countries supported the idea of strengthened cooperation between the Commission and other bodies concerned with international law, as exemplified by the enhanced dialogue between the Commission and the Committee of Legal Advisers on Public International Law of the Council of Europe. The Nordic countries noted with satisfaction the exchanges held between the Commission and the International Court of Justice. The Court and the Commission had distinct but mutually reinforcing functions.

42. The Commission's consultations with scientific institutions, individual experts, international or national organizations and other bodies within and outside the United Nations were equally important for the progressive development and codification of international law, and should include an exchange of views and experience with the relevant contributors to international law.

43. While the Commission should remain the main body for discussion of the general principles of international law, its time should not be spent on issues that were dealt with in more specialized forums.

44. The Nordic countries considered that the primary rules had now been codified in the major fields of international law, including treaty law, diplomatic and consular law, human rights law, the law of the sea and humanitarian law applicable in armed conflicts. The time was right for achieving substantive progress on the secondary rules concerning State responsibility. The focus should, moreover, be on practical needs rather than on theoretical debates. Topics such as diplomatic protection were ripe for codification. It should be recognized that the completion of the current agenda within the quinquennium would require most of the Commission's attention, leaving it less time to assist other bodies. Any extra time should be set aside to enable the Commission to render such assistance, rather than taking on new tasks.

45. In general, the Nordic countries recommended that further elaboration of environmental rules should be postponed for the time being. The topics of international liability for injurious consequences arising out of acts not prohibited by international law and of State responsibility were closely related to environmental protection, a subject which was being dealt with in various specialized bodies where solutions were tailored to specific environmental problems. The Commission should continue to focus on general rather than specialized fields of international law.

46. The Nordic countries took note with interest of the report of the Commission's Working Group on Jurisdictional Immunities of States and their property (A/54/10, annex). The report would be the basis for consideration of the topic by the Working Group of the Sixth Committee. The question of codification of the law of State immunity obviously remained controversial. The Nordic countries would refer to that question and to the timing of a possible diplomatic conference in the Working Group. Admittedly, a convention on State immunity was a viable long-term goal. The existing draft, however, raised a number of questions requiring further discussion. Among other things, the traditional division between *acta iure imperii* and *acta iure gestionis* was not reflected in the proper way.

47. **Mr. Yachi** (Japan) said that the codification of international law was now an integral part of the lawmaking process of the international community. Enormous progress had been made since the United Nations had established the Commission. Lately, however, critical views had been expressed concerning the stagnation of the Commission's codification work. In his Government's view, such criticism was misplaced. International law remained underdeveloped in many areas. Even in the fields that were well covered by legal instruments, attention must be paid to the need for possible review. The Commission needed to cooperate closely with various bodies having lawmaking responsibilities, one of which was the Committee.

48. Turning to chapter VII of document A/54/10, he said that his Government was concerned about the situation of State practice with regard to State immunity. It was recognized that States enjoyed immunity from foreign jurisdiction for acts of sovereign authority and that immunity did not apply to their commercial activities. However, the modalities of such restrictive immunity varied considerably, depending on the legal tradition of the forum State. Several States had enacted domestic legislation to re-establish coherence in their jurisprudence with regard to State

immunity. Such domestic legislation constituted a very significant contribution to the development of the law in that area. It was not, however, the ultimate solution to providing an international standard in the practice relating to State immunity. The question was how to establish basic international rules governing modalities of State immunity at a time when most countries were shifting to a restrictive doctrine of immunity. The Committee should therefore resume substantial discussions on the draft articles on jurisdictional immunities of States and their property in the next few years with a view to adopting the draft articles in the form of a convention.

49. His delegation welcomed the Commission's adoption of the draft articles on nationality of natural persons in relation to the succession of States (A/54/10, ch. IV), which struck the proper balance between the right of an individual to obtain nationality and the right of the State to grant nationality. His delegation supported the Commission's recommendation to the General Assembly that the draft articles should be adopted in the form of a declaration and that, with the adoption of those draft articles, the Commission's work on the topic should be considered concluded.

50. Lastly, his delegation welcomed the Commission's initiative in the field of international environmental law. In formulating general rules on the topic, the Commission should refine the scope of its work and choose specific themes.

51. **Mr. Westdickenberg** (Germany), referring to the draft articles on nationality of natural persons in relation to the succession of States, adopted on second reading by the Commission, said that his delegation supported the few changes made in the draft articles since the first reading in 1997. It had been a good idea to reposition former article 27 as article 3 to conform with the two Vienna Conventions on Succession of States. The substitution of the words "concern the international community" for the words "are of concern to the international community" in the first preambular paragraph was advantageous, since the phrase "of concern" had been given a special meaning in relation to crimes defined under the Rome Statute of the International Criminal Court. His Government also welcomed the change made in the present article 7 (formerly article 6) to limit the retroactive effect of the article to situations where the persons concerned would otherwise be stateless.

52. His delegation supported the recommendation to the General Assembly that it should adopt the draft articles in the form of a declaration. In his Government's view, the Commission had completed its work on the topic, and there was little practical value in its taking up the question of the nationality of legal persons.

53. With regard to jurisdictional immunities of States and their property, his delegation would like to comment on the five main issues the Commission had reviewed. In defining the concept of a State, it was very difficult to know how to deal with the constituent units of a federal State and political subdivisions of the State. The wording suggested by the Working Group for article 2, paragraph 1 (b), attributing to the State the conduct of entities exercising governmental authority (A/54/10, annex, para. 30), might be a way to harmonize the concept of the State for purposes of immunity with that for purposes of State responsibility and was worth considering.

54. His delegation concurred with the view that the distinction between the so-called nature and purpose tests for determining the commercial character of a contract or transaction was not likely to be significant in practice; it supported the elimination of references to nature and purpose tests in the text. On the question of State enterprises, his delegation supported the short wording for article 10, paragraph 3, suggested by the Working Group. In relation to contracts of employment, his delegation believed that the best way to deal with the issue raised with respect to article 11, paragraph 2, of the draft articles was to provide a non-exhaustive list of employees performing functions in the exercise of governmental authority.

55. The question of measures of constraint against State property was delicate and complex and required more work. The distinction between prejudgement and post-judgement measures might be useful. A role for international dispute settlement should be provided. The General Assembly might also decide to leave the issue to State practice.

56. Recent developments in State practice and legislation had shown that the issue of jurisdictional immunity in the case of violations by acts of States of human rights norms having the character of *jus cogens* was central to the subject of jurisdictional immunity and deserved further attention.

57. His Government would like to see future work on jurisdictional immunities take the form of a model law. The topic could then be revisited by the General Assembly at its fifty-sixth session.

58. **Mr. Rebagliati** (Argentina) said that in order for the Commission's work on the codification of international law to be truly effective, it must ultimately take the form of multilateral conventions. The fact that many such conventions were not entering into force for lack of ratification had led the Commission to formulate instead

principles, guidelines or model laws, in other words, "soft law". Although that approach might in some cases be appropriate, the main thrust should be to systematize customary law into legally binding instruments.

59. His delegation attached great importance to maintaining and deepening relations between the Commission and related institutions, particularly the International Court of Justice, whose opinions and judgements played a fundamental role in identifying customary law and developing the principles of international law. The Commission could also benefit from closer relations with the International Tribunal for the Law of the Sea and the regional courts of justice, and it could enrich its codification work through genuine dialogue and a more fluid exchange of information with regional counterparts, such as the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee and the European Committee on Legal Cooperation. Equitable representation, particularly from developing countries, would add to the value of the International Law Seminar held each year in Geneva.

60. With regard to the long-term programme of work of the Commission, the topics proposed (responsibility of international organizations; the effect of armed conflict on treaties; shared natural resources; and expulsion of aliens) met the selection criteria of timeliness, usefulness, codification feasibility and interest to most States. His delegation would therefore ally itself with efforts to ensure that the Commission had the resources it needed to carry out its work.

61. His delegation supported the draft articles on nationality of natural persons in relation to the succession of States. Most of their provisions reflected observed practice and were in keeping with the literature and case law in the field; the articles also reflected the latest developments in international protection of human rights.

62. Although the process of decolonization had been largely completed, there were still colonial situations to which the rules of nationality contained in the articles would apply. Decolonization could take many forms; territories might become independent, unite, or merge with another State. Although, unlike the Vienna Conventions on the Succession of States, the draft articles did not specifically provide for such cases, the principles and rules they contained could cover all the hypotheses mentioned.

63. Argentine legislation was in harmony with all the principles set forth in the draft articles, particularly the right to a nationality, respect for the will of persons concerned, prevention of statelessness, non-discrimination and concern for the unity of the family.

64. His delegation supported the Commission's recommendation that the General Assembly should adopt the draft articles in the form of a declaration and would sponsor a resolution to that effect. A declaration might well be the most readily accepted instrument with the greatest impact on domestic law and practice and influence on bilateral agreements, a first step towards the formation of legal norms.

65. **Mr. Lavalle** (Guatemala) said that if the General Assembly adopted the draft articles on nationality in the form of a declaration, it would be the first declaration adopted by the Assembly on the recommendation of the Commission. There were advantages to adopting the draft articles in that form rather than in the form of a treaty, as had been pointed out by Switzerland in its general remarks contained in document A/CN.4/493.

66. There were few differences between the text currently before the Committee and the one that the Commission had adopted on first reading in 1997. Most of the proposals made by Governments in document A/CN.4/493 had not been accepted. That was regrettable, since many of them were valuable. As a result of the deletion of draft article 19 from the 1997 text, a change which his delegation had proposed, nearly all the provisions of the text were presented as binding. A distinction should be made between provisions of a customary nature and those that would constitute progressive development. Moreover, the provisions having the character of *jus cogens* should be separated from the rest.

67. As indicated in the third paragraph of Greece's general remarks in document A/CN.4/493, as well as in the final paragraph of Guatemala's remarks on article 4 in the same document, the text implicitly established the general rule that a successor State was obligated, in all cases, to attribute its nationality to the persons concerned who, at the time of succession, had their habitual residence in its territory. It was regrettable, therefore, that that rule was not stated expressly in part I of the current draft.

68. Document A/CN.4/493 contained two proposals by Switzerland that should be accepted, especially as they were very easy to implement. They pertained to draft articles 5 and 6 of 1997, which corresponded to draft articles 6 and 7 in the current text.

69. With regard to draft article 13 of 1997, corresponding to draft article 14 of the current text, his delegation agreed with the comments made by France and by Switzerland in document A/CN.4/493. Moreover, as noted by Argentina in its comment on article 20 in the same document, the

application of that article posed the danger that the annexing or acquiring State could not exercise sovereignty in a territory whose inhabitants belonged entirely to another political community.

70. It was regrettable that his delegation's comments on article 20 in document A/CN.4/493 had not been taken into account. His delegation had recommended that the regime established by part II, section 1, of the current draft should, as far as possible, be harmonized with the regime established by part II, section 4. A step had been taken in that direction by making the change in article 20 proposed by the Czech Republic in document A/CN.4/493. His delegation, while satisfied with that change, believed that its suggestions should also have been adopted.

71. His delegation did not see any basic difference between the assumption in section 1 and the assumption in section 2. He invited the Committee to posit the existence of a State A, which had a province called Silvana adjoining State B. He then put forward two hypotheses. Under hypothesis 1, Silvana would become a province of State B without changing its name. Under hypothesis 2, Silvana would become an independent State, again without changing its name. Hypothesis 1 was governed by section 1 and hypothesis 2 by section 4. The regime would therefore be very different depending on which of the two hypotheses was applied.

72. Under hypothesis 1, a succession of States would take place in that Silvana would go from State A to State B. Under hypothesis 2, a succession of States would also take place. In the first case, however, the Government in charge of Silvana's foreign relations, in other words, the Government of State B, would also be in charge of the foreign relations of other territories, while in the second case, the Government in charge of the foreign relations of Silvana would be responsible only for Silvana. Moreover, in the first case, the inhabitants of Silvana, to the extent that they had become nationals or residents of State B, could take up residence not only in any part of the territory of Silvana, but also in any other province of State B, a right which such persons would not enjoy in the second case. He failed to see the justification for that discrepancy. If his delegation's suggestion for eliminating the discrepancy was not adopted, the Commission should at least accept the suggestion made by Switzerland in the last paragraph of its comments on article 20 (A/CN.4/493). In any event, in the application of the declaration it would be appropriate and perhaps necessary to fill the gaps in section 1 by borrowing from the provisions of section 4.

73. Lastly, he proposed drafting changes to the titles of section 1 and 4, to paragraphs 1 and 2 of draft article 8 in the English version, and to the title of draft article 10.

The meeting rose at 3.20 p.m.

United Nations A/C.6/54/SR.16

General Assembly
Fifty-fourth session

Official Records

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Sixth Committee

Summary record of the 16th meeting
Held at Headquarters, New York, on Tuesday, 26 October 1999, at 12 noon.

Chairman: Mr. Mochochoko ..... (Lesotho)

Contents

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

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99-81884 (E)

The meeting was called to order at 12.15 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Lagos Erazo** (Chile) noted with satisfaction the treatment that the International Law Commission had given in recent years to certain topics of enormous interest to the international community, such as nationality in relation to the succession of States and jurisdictional immunities of States and their property. With regard to the Commission's programme of work, his delegation also noted with satisfaction the emphasis placed on consultations with States with a view to putting specific questions to them. That method, and the use of questionnaires, were of greater value for the work of the Commission than the elaboration by States of theoretical reports.

2. Turning to the topic of reservations to treaties (A/54/10, chap. VI), his delegation supported the Commission's proposal that a Guide to practice should be elaborated in the form of draft guidelines which would serve as the basis for the practice of States. The inclusion of model clauses would also be of great use to States and international organizations.

3. Implicit in that proposal was the understanding that no revision of the provisions contained in the Vienna Conventions of 1969, 1978 and 1986 would be undertaken. That was a wise choice, since to undertake such a process could weaken the existing provisions.

4. While the concept of a reservation as defined in the Guide did not correspond fully to the wording of the Vienna Conventions, it contained a new element which had emerged in practice, namely, that a reservation produced legal effects not only on one or more provisions, but also on the treaty as a whole.

5. It was very important to establish a definition of an interpretative declaration. While such declarations were often confused with reservations, they had different purposes; in making a reservation, a State endeavoured to modify or exclude the legal effects of one or more provisions, while in making an interpretative declaration, a State expressed its view that a specific interpretation should be given to a provision or to the treaty as a whole.

6. It was important that the Guide should, in the case of treaties that prohibited reservations, establish the assumption that a unilateral declaration did not constitute a reservation. Nevertheless, the Special Rapporteur's proposal in guideline 1.3.3 appeared to be weakened by the phrase "except when it purports to exclude or modify the legal effect of certain provisions of the treaty". That formulation did not state directly that a declaration made with such intent should be considered improper by States.

7. The only reason for including the concept of a declaration in the Guide was to establish the difference between a declaration and a reservation. The two concepts should not be handled in the same way. Interpretative declarations were linked to the problem of interpretation of treaties, as was clear from the fact that they were included within the scope of the Vienna Convention on the Law of Treaties of 1969.

8. With regard to unilateral acts of States (A/54/10, chap. VIII), one issue raised by the topic was whether so-called unilateral legal acts existed in international law. Consistent and growing State practice and some international legal precedents indicated that the existence of unilateral acts which produced legal effects could be verified.

9. In accordance with the concept of a unilateral act elaborated by the Commission, such an act was understood as a unilateral statement by a State by which such State intended to produce legal effects in its relations to one or more States or international organizations and which was notified or otherwise made known to the State or organization concerned.

10. In earlier studies to determine whether an act should be included within the category of unilateral acts, the Special Rapporteur had concluded that only those acts that were doubly autonomous, in other words, those that did not emanate from other legal acts and that the State was free to carry out, could be called unilateral acts.

11. His delegation concurred with the concept of autonomy proposed by the Special Rapporteur as a first step towards defining the scope of unilateral acts. He therefore questioned its elimination from the definition of unilateral acts proposed by the Commission. The Commission seemed to imply that unilateral acts should be limited to statements and that other types of unilateral acts should be excluded. Such a restriction was self-limiting.

12. His delegation believed that it was correct for the definition to include the element of intent, which would also make it possible to distinguish between legal acts and political acts. Nevertheless, as intent was associated with an expression of will, it might be difficult to establish. His delegation therefore concurred with the view expressed by some members of the Commission that States could carry out unilateral acts without knowing that they were doing so.

13. **Mr. Rotkirch** (Finland), speaking on behalf of the Nordic countries, said that the proposed declaration on nationality of natural persons in relation to the succession of States would be a useful and timely contribution to the development of uniform solutions to the problems of changes of nationality resulting from the succession of States. That was all the more important as no serious attempt had been made before to elaborate a universal instrument to regulate that notoriously difficult field. The promptness and efficiency with which the Commission had produced the comprehensive set of draft articles was another source of satisfaction.

14. The Nordic countries welcomed the consistent focus throughout the draft articles on human rights, the prevention of statelessness and the prohibition of discrimination on any grounds. With the development of human rights law, it had been recognized increasingly that State discretion in questions relating to nationality must be limited with regard to the fundamental rights of individuals. The Nordic countries also noted with satisfaction the acknowledgement in both the draft articles and the commentaries of the importance of the European Convention on Nationality of 1997, which constituted a significant standard in questions of nationality.

15. The delegations on whose behalf he spoke supported article 1, which not only reinforced the right to a nationality but also gave it a precise scope and applicability. They also welcomed the obligation imposed on States concerned to take all appropriate measures to prevent statelessness, as well as the other articles aimed at enhancing the protection of the human rights of persons concerned. The Nordic countries fully endorsed the general principle that the status of persons concerned as habitual residents should not be affected by the succession of States. Also important were the provisions that expressly prohibited arbitrary decisions on nationality issues. All too often, treaty provisions or national citizenship laws which were generous on paper ended up being considerably restricted in their practical implementation.

16. The Nordic countries welcomed the clarification of the scope of application of the draft declaration, made during the second reading of the draft articles, through the deletion of a part of current article 3 which might have given rise to conflicting interpretations. The decision to delete former article 19 and to put the two sections of the draft articles on the same footing also seemed warranted, since the differences between the two parts related mainly to the degree of generality of the provisions, and not to their normative nature.

17. The Nordic countries fully supported the proposal that the draft articles should be adopted in the form of a declaration. They preferred a non-binding instrument which could be of immediate assistance to States dealing with problems of nationality in relation to the succession of States. A declaration of the General Assembly would provide an early, yet authoritative, response to the need for clear guidelines on the subject. The Nordic countries endorsed the adoption of the draft declaration during the current session of the General Assembly.

18. With regard to the second part of the topic, the Nordic delegations agreed with the Commission's conclusion that in the absence of positive comments from States, the Commission's time and resources could more usefully be devoted to other issues.

19. **Mr. Abraham** (France) said that for a number of reasons a declaration did not seem to be the most appropriate form for the draft articles on nationality of natural persons in relation to the succession of States.

20. First, it was difficult to rule out the form of a convention, since the purpose of the draft articles was to define a number of rules which would be imposed on the States concerned by a succession, and particularly since some of the rules envisaged in the draft articles would modify some rules of customary origin.

21. Second, if the draft articles did not take the form of a convention, the main goal of codification, namely the drafting of new binding instruments, would not be achieved.

22. Third, if the draft articles were adopted as a declaration of the General Assembly the rules enunciated therein might in practice serve merely as a reference, as they would not be treaty rules and some of them might be disputed by certain States. It was important to avoid any ambiguity in the definition of norms.

23. It would be preferable to review some of the provisions of the draft articles on the basis of the written comments addressed to the Commission by States and to consider the drafting of an international convention on the topic which would be a useful complement to the 1978 and 1983 Vienna Conventions on the succession of States. The structure of the draft articles was similar to that of those two conventions, which seemed to imply that the original aim had been to produce a draft convention.

24. **Mr. Malenovsky** (Czech Republic) said he was satisfied with the structure of the draft articles, which was based on that of the two Vienna Conventions on the succession of States. A set of general provisions pertaining

to all categories of the succession was followed by specific rules applicable to individual types of succession.

25. It was appropriate to confine the scope of the study of the topic at the current stage to natural persons, as the important issue of legal persons was a highly specific one which should be dealt with by the Commission separately at a later stage.

26. His delegation supported the concept of the right to a nationality as defined in article 1. All other rules should be in compliance with that primary principle.

27. Article 4, on the prevention of statelessness, was a significant provision and formed a corollary of the right of the persons concerned to a nationality. The elimination of statelessness should be one of the main goals for every State in drafting a nationality law.

28. In that connection, a major step towards the development of international law had been taken with the formulation of article 11, paragraph 2, which provided that each State concerned should grant a right to opt for its nationality to persons concerned who had appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States. Although some States had expressed the view that the provision did not comply with the notion of a "genuine link", and therefore had no justification, his delegation was convinced that the paragraph was very significant and fully reflected the importance attached by the commission to the prevention of statelessness.

29. Articles 8, 10 and 11 assigned a considerable role to the will of persons concerned in connection with the attribution of a nationality. On the other hand, it was appropriate that that role was reduced in favour of the stronger competence of the successor State in a case where statelessness would otherwise be the result.

30. In part II, the Commission did not claim to reflect existing international law, which still lacked discernible and clear rules which would strike a suitable balance between human rights considerations on the one hand and the norms of State succession as a special field of international law on the other. His country, like others, had to some extent become a victim of those uncertainties in international law when the issue of nationality in relation to succession had arisen a few years previously. Articles from part II of the report could provide valuable guidance and a source of inspiration in future similar situations.

31. Given the nature of the issue involved, a draft declaration to be adopted by the General Assembly seemed to be the most appropriate form for the draft articles. If the purpose was to provide States with a set of legal principles and recommendations to be followed by their legislators when drafting nationality laws, the form of a declaration might have some advantages over the rather rigid form of a convention, traditionally used for the finalization of the work of the Commission. His delegation therefore supported the Commission's recommendation to the General Assembly that the draft articles should be adopted in the form of a declaration and that with their adoption the work of the Commission on the topic of nationality in relation to the succession of States should be considered concluded.

The meeting rose at 12.55 p.m.

United Nations A/C.6/54/SR.17

General Assembly
Fifty-fourth session

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Sixth Committee

Summary record of the 17th meeting
Held at Headquarters, New York, on Wednesday, 27 October 1999, at 10 a.m.

Chairman: Mr. Mochochoko ..... (Lesotho)

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Visit by the President, Vice-President, Judges and Registrar of the International Court of Justice

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

Agenda item 159: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*)

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99-81917 (E)

The meeting was called to order at 10.15 a.m.

Visit by the President, Vice-President, Judges and Registrar of the International Court of Justice

1. **The Chairman** welcomed to the Committee the President of the International Court of Justice, Mr. Stephen Schwebel, the Vice-President of the Court, Mr. Christopher Weeramantry, the Judges of the Court, Mr. Gilbert Guillaume, Mr. Raymond Ranjeva, Ms. Rosalyn Higgins and Mr. Gonzalo Parra-Aranguren, and the Registrar of the Court, Mr. Eduardo Valencia-Ospina. He then invited the President of the Court to address the Committee.

2. **Mr. Schwebel** (President of the International Court of Justice) said that the pace of the Court's work was determined not only by the Rules of Court, the will of the members of the Court and the capacities of the Registry, but also by the cooperative attitude of States parties to the cases before it. If the parties raised preliminary objections for tactical rather than objective reasons, pleaded at excessive length and attached long annexes to their pleadings or called for unduly extended oral proceedings, the length of the proceedings would be drawn out. The same was true if the parties made repeated requests for extension of the deadlines for filing cases. The Court and its Rules Committee had begun to revise the Rules and working methods of the Court in order to expedite its procedures, and had invited the parties to the cases before it to cooperate in that process.

3. Reform and acceleration were needed more than ever because the Court's docket was so heavy. Eighteen cases had been filed in the previous year, bringing the total number of cases to 24. The docket included the following: a case concerning maritime delimitation and territorial issues between Qatar and Bahrain; a case brought by the Libyan Arab Jamahiriya against the United States of America concerning the interpretation and application of the 1971 Montreal Convention arising from the Lockerbie incident, although that case was inactive pending the outcome of the trial of the two accused persons that was to take place in the Netherlands in a special Scottish court; a case brought by the Islamic Republic of Iran against the United States of America for the destruction of oil platforms in the Persian Gulf during the Iran-Iraq war; a case brought by Bosnia and Herzegovina against the Federal Republic of Yugoslavia concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide; cases involving boundary issues between Cameroon and Nigeria, Botswana and Namibia, and Indonesia and Malaysia; a case brought by Germany against the United States of America concerning a German national who had been sentenced to death by a United States court without any notification of the German Consul-General and had subsequently been executed despite an order of the Court; eight cases brought by the Federal Republic of Yugoslavia against Belgium, Canada and other countries concerning the legality of the use of force; three cases brought by the Democratic Republic of the Congo against Burundi, Uganda and Rwanda, respectively; and two new cases, one brought by Croatia against the Federal Republic of Yugoslavia concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, and one brought by Pakistan against India concerning the shooting down of a Pakistani aircraft. That list not only illustrated the breadth of the Court's docket and the importance of the cases it contained, but also the range of parties making use of the Court. Both the Court and Member States could take satisfaction from that.

4. **The Chairman** thanked the President of the International Court of Justice for his statement.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

5. **Mr. Obou** (Côte d'Ivoire) said that the question of nationality was complex because it arose at the interface between international law and positive national law, yet it was vital to the identity of any individual, since to be stateless was to be dead to civic life. Statelessness posed a thorny problem for the international community, and his delegation shared the concerns of the International Law Commission in the matter. Yet it was also clear that legal scholars looked askance at dual or multiple nationality, which created a sort of "chameleon" citizen who could shift nationality at will.

6. The question of nationality was further complicated when, as a result of a succession of States, two or more legal systems collided or overlapped, and ostensibly logical and transparent criteria of nationality proved to be obscure and elusive when applied in real circumstances. The experience of African States with a French legal tradition was instructive in that regard.

7. To begin with, citizenship, which ought to be the natural concomitant of nationality, had been separated from it under colonial law. French colonial subjects had been French nationals but had for the most part been denied French citizenship. Moreover, when the former French colonies had gained independence, they had inherited permeable, fluid and arbitrary borders and overlapping

indigenous and colonial legal systems. Their legislators had had to choose between *jus sanguinis* or *jus solis* or some combination of the two as a basis for nationality. *Jus solis*, which relied on the criterion of "habitual residence", offered the advantage of logical simplicity but risked separating family groups or touching off migrations of population. To avoid those problems, most of the States in question had opted for nationality based on consanguinity.

8. However, in a society still heavily based on oral tradition whose population was constantly on the move, it was hard for an individual to present material proof of consanguinity. There was the further complication that a few nationals of the new States had maintained French nationality as well. In the States formed by the succession of former French colonies, the problem of nationality was far from resolved and tended to re-emerge during presidential and legislative elections.

9. The contribution of the International Law Commission to nationality law was a noteworthy achievement. There were just two points his delegation wished to raise in that connection. First, the wording of article 3 of the draft articles on nationality of natural persons in relation to the succession of States limited the scope of application of the draft articles to a succession of States occurring in conformity with international law. The Commission had decided not to address situations such as illegal annexation of territory. In many cases of succession the dividing line between legal and illegal was difficult to draw. However, the integrity of some States was being menaced by civil war and aggression, and statelessness was a grave problem in cases of illegal annexation. The law could not indefinitely ignore irregular situations associated with humanitarian problems. His delegation therefore intended to encourage the Commission to be more forward-looking and seek to anticipate needs.

10. His second point concerned the Commission's choice of "habitual residence" as the main criterion for establishing a presumption of nationality. Fortunately, the Commission had allowed it to remain a "rebuttable presumption". Habitual residence, which was based on *jus solis* rather than *jus sanguinis*, entailed risks for some developing States. Nationality, by establishing solid legal ties between a State and an individual, created obligations and conferred rights. Habitual residence in itself did not form a sufficient basis for those reciprocal ties. In its judgment in the *Nottebohm* case the International Court of Justice had seemed to be saying that habitual residence was a necessary but not sufficient criterion. Moreover, to make habitual residence the dominant criterion would tend to run counter to the recognition in the second preambular paragraph that nationality was essentially governed by internal law, the traditional prerogative of the State.

11. Since the Commission seemed to be suggesting that States should ignore the sacrosanct legal principle of non-retroactivity and furthermore was recommending that the draft articles should be adopted by the General Assembly in the form of a declaration, thus bypassing the process of ratification in arriving at a universal standard, it would be well if all delegations were agreed on the meaning. In order to be able to support the articles, his delegation would wish to see more explicit, less debatable criteria for determining the existence of an effective link, or genuine connection, such as those outlined in the *Nottebohm* judgment. Such an approach would also help to prevent any misinterpretation that might adversely affect developing countries.

12. **Mr. Szenasi** (Hungary) said that the draft articles on nationality of natural persons in relation to the succession of States afforded a workable framework of substantive issues and procedures for dealing with an issue that continued to pose sensitive political, legal and practical problems. He noted with satisfaction that draft articles 22 and 24, on which his country had concentrated during the earlier stages of work, had been further clarified and that draft article 16 had been elevated to the level of a general principle, while draft article 20 now included further measures to prevent statelessness. Those particular draft articles, together with draft articles 14, 15, 17 and 18, clearly demonstrated the international community's determination to protect the interests of individuals in the area of nationality.

13. General acceptance of and strict adherence to the principles set forth in the draft articles would constitute another step forward in the effort to safeguard human rights. The draft articles could also provide additional protection against any adverse measures to which minorities and others might be subjected during periods of unrest.

14. In view of the significant improvements and clarifications introduced to the text, he was convinced that the draft articles would now serve as a guiding force in the area of nationality regardless of format. His delegation therefore supported the proposal to recommend to the General Assembly their adoption in the form of a declaration. He also shared the view of the International Law Commission that the issues surrounding the nationality of legal persons were too specific and that the practical need for their solution was not evident. He thus agreed with the Commission's proposal that, on adoption of the declaration, the topic of nationality in relation to the succession of States should be deemed to have been successfully concluded.

15. **Mr. Niehaus** (Costa Rica) said that the issue of the nationality of natural persons in relation to the succession of States was made more difficult by the limited amount of case law, differences in national legislation and the political disputes that had occurred in some States involved in successions. Moreover, developments in the field of human rights law had shifted the centre of gravity of nationality law by introducing *jus cogens* provisions. Attribution of nationality could no longer be considered as merely a privilege of States but had, in some cases, become a positive obligation under human rights law.

16. His delegation therefore appreciated the delicate balance the Commission had struck in the draft articles between the fundamental rights of the persons concerned and the interests of States involved in a process of succession. From a human rights standpoint, it welcomed the wording of articles 1 and 4 recognizing the right to a nationality and calling upon States to prevent statelessness and felt that their general nature was appropriate, since they were based on the Universal Declaration of Human Rights. It could support the provision relating to presumption of nationality in article 5 which sought to prevent temporary statelessness and was pleased by the emphasis placed in article 11 on respect for the will of persons concerned. Paragraph 1 of article 8 set a realistic limitation on the obligation to attribute nationality, and the draft articles as a whole were neutral on the subject of dual nationality and gave States wide latitude in setting their own rules.

17. His delegation attached great importance to the provisions of article 12 urging States to take all appropriate measures to protect the unity of the family. However, it would have preferred even stricter wording allowing all members of a family group to acquire the same nationality if they would otherwise have had difficulties being united. His delegation also supported article 13, which provided for attribution of a State's nationality to a child born on the territory of that State after a succession. However, while that provision was valuable in that it prevented statelessness, a provision allowing the child to acquire the nationality of its parents would have been preferable. His delegation also supported the wording of article 19, which reflected current jurisprudence on the notion of an "effective link" between the individual and a State. Lastly, the emphasis in Part II of the draft articles on the principles of "habitual residence", "effective link" and "right of option" as they applied to different types of succession was welcome.

18. Overall, his delegation could accept the draft articles and agreed that the General Assembly should adopt them in the form of a declaration. A treaty would offer the advantage of being binding on States parties and bringing the codification process to a definitive close; however, in a succession of States, accession to the treaty by the new States would not be automatic, whereas the problem of nationality would require an immediate legal solution. If adopted as a declaration, the draft articles could be a source of inspiration in the ongoing development of customary international law, and all States involved in a succession could refer to it.

19. Her delegation regretted the Commission's decision not to pursue the topic of the nationality of legal persons in relation to the succession of States.

20. **Ms. Alajbeg** (Croatia) said that the draft articles on nationality in relation to the succession of States made a pertinent contribution to the codification and progressive development of international law. However, the draft articles departed considerably from the traditional approach to the law of nationality, which commonly confined legal issues of nationality to the domain of domestic law, and her delegation did not believe that States should be placed under constraints when applying the articles. A certain flexibility should be preserved; that could be achieved through the legal solutions contained in the articles themselves and the final form in which the articles were adopted.

21. Two important principles had been followed throughout the draft articles. One was that the proposed solutions must be based on an "appropriate connection" between the State and the individual. The second principle was that each type of change in regard to the predecessor State, such as unification, dissolution or separation, must be regarded separately in legal terms so as to reflect the facts of each case. In the case of the dissolution of federal States comprising constituent units, one specific criterion represented an appropriate connection, namely, the nationality of the constituent unit. That criterion should be the prevailing one, and its application should be regulated by a new, separate provision under article 22. Such a rule should reflect the established practice of successor States which, in attributing their nationality to individuals, chose the criterion of nationality of the constituent unit as the most appropriate connection between the State and the individual. The successor States to Yugoslavia and Czechoslovakia, for example, had adopted in their respective legislation the criterion of nationality of the republics which had constituted the former Yugoslav and Czechoslovak federations.

22. Consequently, her delegation associated itself with the comments made by Brunei Darussalam on article 22 in document A/CN.4/493, namely, that the article gave too much prominence to the criterion of habitual residence, in disregard of recent practice in Central and Eastern Europe,

where the primary criterion used had been that of the nationality of the former units of federal States.

23. The nationality of the constituent unit should therefore be the dominant criterion, with habitual residence a subsidiary criterion, subject to the domestic legislation of the successor State. In practice, the legislation of the successor States of federal predecessor States generally contained specific provisions concerning the mode of acquisition of nationality by persons concerned. The procedure for the acquisition of nationality by such persons was simpler and faster than the one prescribed for other aliens, so that the likelihood of their statelessness was minimized. In fact, the prospect of statelessness did not arise, as each individual had possessed the nationality of one of the constituent federal units prior to dissolution and maintained that nationality in the newly formed successor State. The draft articles should therefore contain a specific provision recognizing the nationality of the constituent unit as the general criterion for the attribution of nationality in the case of dissolution of a federation.

24. The draft articles would be more appropriately adopted in the form of a General Assembly declaration or resolution than in the form of a treaty. If the purpose of the proposed instrument was to provide States involved in a succession with a set of legal principles and recommendations to be followed in drafting nationality laws, a declaration would be sufficient. If adopted by consensus, such a declaration would acquire authority. It would set clear guidelines without crossing the line into the inherent domestic jurisdiction of a State. It might also have the advantage of speed and flexibility over a treaty, which could not be invoked when most needed, namely, in the case of a new State that had not had time to sign or ratify it. It was significant that the 1997 European Convention on Nationality had been ratified by only two States parties.

25. **Mr. Baena Soares** (Brazil) said it was clear from the report that the possibilities for the Commission's work were far from exhausted. It was increasingly important for analogous organizations, such as the Inter-American Juridical Committee, the Asian-African Legal Consultative Committee and the Committee of Legal Advisers on Public International Law of the Council of Europe, to establish a more intense dialogue with the Commission, and not only by sending representatives to its formal sessions. It would be appropriate to increase the exchange of publications and documentation between the Commission and each of those organizations. Greater openness towards the academic world would also be constructive. Like the Commission, the Inter-American Juridical Committee also held seminars on international law; it might therefore be appropriate for the persons in charge of those initiatives to meet so as to benefit from each other's experience.

26. The Commission periodically requested responses from Governments to questionnaires which it had circulated. Chapter III of the report mentioned the specific issues on which comments would be of particular interest to the Commission. One of the main factors in the success of the Commission's work was the dialogue and interaction between the Commission and the Sixth Committee. While the questionnaires could, of course, be shorter, their length was not a valid reason for failure to reply.

27. Turning to the draft articles on nationality of natural persons in relation to the succession of States, he noted with satisfaction the humanist philosophy and the concern for human rights reflected throughout the draft text. The preamble recalled the right of every person to a nationality, proclaimed in the Universal Declaration of Human Rights, and recognized that in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals. The commentary on the preamble referred to the opinion of the Inter-American Court of Human Rights that the regulation of matters bearing on nationality was not within the sole jurisdiction of States.

28. His delegation was satisfied that the structure of the draft articles afforded sufficient scope for the topic, and it endorsed the proposal by the Chairman of the Commission that the text should be adopted. He wished to point out, however, that while his delegation had no objection to the draft articles being adopted in the form of a declaration, it believed that a convention would have greater authority and binding force. In any event, success would be determined by the willingness of Governments to implement whatever instrument was adopted. As always, the political will of Member States would be decisive.

29. His delegation concurred with the Commission that with the adoption of the draft articles its work on the topic should be considered concluded. If Member States so wished, they could always invite the Commission to resume its work on the topic of nationality of legal persons in relation to the succession of States.

30. **Mr. Grasselli** (Slovenia) said that his delegation supported the inclusion of the nationality of legal persons as a new topic in the Commission's programme of work.

31. The wording of the draft articles on nationality of natural persons in relation to the succession of States emphasized the generally accepted principle that the succession of States should not render natural persons stateless, and his delegation supported the recommendation

that the General Assembly should adopt the draft articles in the form of a declaration.

32. The basic criterion for acquiring nationality in the draft articles was habitual residence, and it was applied without discrimination to the cases of cession of part of a territory, dissolution of a State and separation. That solution did not seem the most appropriate in the case of the dissolution of a federal State, where the main criterion for attribution of nationality should be the citizenship of the former constituent republics. The laws concerning the citizenship of former constituent units had as a rule been harmonized. Furthermore, in the event of dissolution or separation of States, the pre-existent internal boundaries of constituent units became international frontiers, thus avoiding the phenomenon of statelessness or multiple nationality, which was the best possible solution. Such an approach took historical circumstances into account and fostered a feeling of belonging. The issue of population residing in third countries was also solved by using that criterion.

33. In the event of the dissolution of a federal State, habitual residence should serve as an auxiliary criterion. Persons habitually residing in the territory of one successor State who, as citizens of a former constituent republic became *ex lege* nationals of the successor State, could thus acquire the nationality of the State in whose territory they were residing if they wished to do so. If they chose not to take the nationality of the State in whose territory they resided, or if, after a succession, they wished to continue residing in the successor State as foreigners, they should be able to do so. The status provided for in article 14 was therefore too general, since it did not give the right to permanent residence, as provided for in the 1997 European Convention on Nationality. It would be preferable to include a provision stipulating the recognition of the nationality of constituent units of federal States in the event of their dissolution.

34. The right of option did not imply that double nationality could be avoided if the option was exercised on the basis of a prior agreement between the successor States, or, in the event of separation of States, with the predecessor State. As the dissolution or separation of States often occurred in turbulent circumstances, the issue of nationality between States concerned had to be solved at a later time or unilaterally. Articles 9 and 25 were of the utmost importance in that connection, as they entitled the successor State to make the attribution of nationality dependent on the renunciation of nationality, and required the predecessor State to cease to consider as its national a person who opted for the nationality of the successor State and habitually resided in the territory of that State. The same rule should apply *mutatis mutandis* in relation to the nationality of other successor States in the event of dissolution.

35. **Mr. Kranz** (Poland) said that the effects of State succession on nationality was an important topic from the perspective of both States and individuals: it defined the scope of State sovereignty in cases of territorial changes and permitted individuals to establish their status and ties with a specific successor State.

36. He shared the Commission's view as to the guiding principles of the draft articles. The draft was generally based upon the notion of effective nationality, which should prevent the granting of nationality to certain categories of nationals of the predecessor State who lacked an appropriate connection with the specific successor State. Lastly, the obligation to admit all habitual residents to the territory affected by the State succession was strictly connected with the right of refugees to return to their homes.

37. The principles relating to the presumption of acquisition of nationality of the successor State and the date of acquisition reflected the principle of automatic acquisition of nationality which had existed in international law prior to the Second World War. However, certain provisions of the draft articles did not seem to reflect the current state of international law. In particular, it was not clear that every person had a right to nationality under general customary law, although such a right would be desirable. A wider retroactive application of the attribution of nationality by the successor State would reflect State practice in that field. The Commission's single approach to the different ways in which States united did not correspond to State practice. Nor did State practice confirm the general duty of the States concerned to grant an option to individuals affected by the State succession. His delegation accepted those proposals as an expression of the progressive development of international law in that field.

38. The extremely interesting but debatable issue of the effects of a State succession on the nationality of corporations should not be taken up by the Commission. Thus the Commission's work on the topic of nationality had been completed. His Government would welcome the adoption of the draft articles in the form of a General Assembly declaration.

39. With regard to the jurisdictional immunity of States, his Government followed State practice closely and endorsed the current shift towards a restrictive doctrine of immunity. He therefore welcomed the Commission's resumption of work on jurisdictional immunities of States and their property, and hoped that the result of that work would be a

draft convention, which would be a useful tool for modifying internal practice.

40. The proposal put forward in the Working Group on that topic to bring the provision of the draft articles relating to the "concept of State for purpose of immunity" into line with the concept of a State contained in the Commission's draft articles on State responsibility was valuable and worth considering. With regard to the distinction between the nature and purpose tests proposed to determine the commercial character of a contract or transaction, his delegation fully endorsed the Working Group's suggestion to delete paragraph 2 of draft article 2 and retain the reference in that article to commercial contracts or transactions without further explanation.

41. He welcomed the new issue of jurisdictional immunity in actions arising out of *jus cogens* norms in the case of acts of States which violated human rights norms having the character of *jus cogens*. Recent events had indicated that that topic deserved the attention of the Commission.

42. **Mr. Hwang Yong-shik** (Republic of Korea) said that his delegation supported the content of the draft articles on nationality of natural persons in relation to succession of States, which reflected the general principles of existing international law. Since the attribution or withdrawal of nationality was ultimately regulated by national legislation or a treaty between the States concerned, the adoption of the draft articles in the form of a declaration rather than a convention meant that they could serve as a guideline for States when they adopted such legislation or treaties.

43. The most important element regarding the acquisition of nationality was set out in draft article 5, which should therefore be considered as the basic solution for the different types of succession of States, insofar as the will of the persons concerned was not expressed or other draft articles or treaties were not applicable. His delegation also attached great importance to draft article 12, as many Korean people had a strong aspiration for reuniting with family members who had been separated for historical reasons.

44. The indicative approach taken by the Working Group on jurisdictional immunities of States and their properties with regard to the definition of "commercial transactions" appeared to depend heavily on the competence of the organs of the forum State, and thus could result in a fragmentation of rules rather than a standardization. The suggestion that article 2 should refer only to "commercial contracts or transactions" seemed to leave the interpretation of those terms to the discretion of each State. A constructive discussion on that critical issue must take place soon in order to prevent arbitrary interpretations that would undermine the benefits of the restrictive doctrine.

45. In principle he supported the Special Rapporteur's approach to the topic of unilateral acts of States, which focused on the core constituent elements of a legally binding unilateral act. However, the proposed definition of "unilateral legal acts of States" in the draft articles contained in the Special Rapporteur's second report did not resolve the issue of how legally valid promises could be distinguished from mere political commitments. The decisive factor seemed to be whether a State had genuinely intended to assume a legal obligation when issuing a unilateral declaration. The element of intent could be hard to prove and was thus susceptible to interpretation. However, it would not be productive to attempt any further refinement of criteria for the purposes of distinction at the present stage.

46. Elaborating specific rules on unilateral legal acts with particular regard to observance and revocation was a daunting task. Given the relative scarcity of available international practice or doctrine, a more extensive accumulation of State practice was required if the Commission was to tackle such issues effectively. The International Court of Justice nad ruled that a restrictive interpretation was called for when States made statements by which their freedom of action was to be limited, and he suggested that similar criteria should be applied to the rules governing unilateral legal acts. If the rules were not drafted with great care, States might be disinclined to publish their policies for fear of being legally bound by the rules.

47. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation believed that the duty of prevention should be regarded as an obligation not of result but of conduct, as embodied in the relevant international environmental treaties. Failure to comply with the obligation of prevention would therefore entail State responsibility, although he recognized that the concept of international liability, as originally envisaged by the Commission, might thereby be somewhat weakened. It was nevertheless important to elaborate rules on international liability per se. Moreover, his delegation shared the view that the draft articles on prevention should not be related to the idea of punitive damage currently being discussed by the Commission in the context of State responsibility.

48. It was too early to determine the final form the draft articles on that topic should take, since international law in the area was still evolving. A framework convention might foster desirable State practice and relevant legal development. With regard to dispute settlement procedures,

draft article 17 provided a reasonable solution, focusing as it did on the mutual agreement of the States concerned. As for the Commission's future work on the topic, his delegation supported suspending work until the Commission finished its second reading of the draft articles on the regime of prevention.

49. **Mr. González** (Venezuela), after reiterating the importance of the links between the Sixth Committee, the Commission, international bodies, such as human rights treaty bodies and regional entities such as the Inter-American Court of Human Rights, welcomed the conclusion of the Commission's work on nationality in relation to the succession of States, with particular reference to natural persons. His delegation had always stressed the need for the Commission's work to be embodied in draft conventions, as part of its work on the codification and progressive development of international law, but it agreed with the Commission that in the case of nationality it was more practical for the draft articles to take the form of a declaration contained within a General Assembly resolution, which would be recommendatory in character.

50. The structure of the draft articles, with general provisions in the first part and specific ones in the second, was entirely acceptable to his delegation. The text properly balanced the right of States to attribute nationality with the right of individuals to acquire it. The enunciation of the fundamental principles of international law in the preamble, particularly its second, fourth and fifth paragraphs, provided the text with a solid foundation. Lastly, his delegation shared the view that the Commission's work on the topic had been concluded; there was no need to consider the question of the nationality of legal persons until an appropriate opportunity arose.

51. **Mr. Rogachev** (Russian Federation) said that the draft articles on nationality of natural persons in relation to the succession of States were a valuable contribution to the codification and progressive development of international law. The topic was extremely important and had far-reaching, practical consequences, as recent experience had shown. The loss of nationality, particularly when involuntary, could have a significant impact on a person's human rights. There were cases where States made a policy decision to infringe the rights of a section of its population in order to exclude it from participation in political, economic or cultural life. The draft articles contained all the elements needed to resolve the practical problems that might arise in that area. His delegation agreed with the Commission that the main aim of the draft articles was to prevent statelessness, in accordance with the Universal Declaration of Human Rights and other international instruments. It also agreed that States had an obligation to attribute nationality to natural persons who on the date of a succession held the nationality of the predecessor State and had an effective link with the territory to which the succession of States related.

52. His delegation endorsed the provisions of Part I, especially those of draft articles 5 and 7. He wished, however, to comment on some specific points. Thus the definition of "succession of States" in draft article 2, subparagraph (a), which was taken from the Vienna Conventions of 1978 and 1983, was not entirely appropriate to the succession of States as applied to nationality. What was important for nationality was not the "responsibility for the international relations of territory" but the change in sovereignty over that territory. His delegation also believed that draft article 2 might include a definition of the term "habitual residence", which, as one of the key aspects of the draft articles, should have a single meaning and application. Draft article 8, paragraph 2, might also be better redrafted: it was surely not appropriate to talk of attribution of nationality "against the will of the persons concerned", as though the forcible imposition of nationality could be contemplated.

53. With regard to draft article 11, paragraph 1 should be preceded by a provision obliging the States concerned to take unilateral and collective measures to create conditions under which persons eligible to acquire the nationality of two or more States concerned could express their will freely.

54. Draft article 13 did not deal properly with cases where the child of a person concerned who had not acquired any nationality was born on the territory of a third State. Moreover, the criterion of birthplace should not be the only one applied to children.

55. The wording of draft article 15 was not entirely satisfactory. His delegation would prefer to replace the phrase "by discriminating on any ground" with "by applying to them any rules or practice that discriminate on any grounds whatsoever".

56. His delegation attached great importance to the elaboration of clear definitions that made it possible to determine in specific cases which State or States had the obligation to attribute nationality to persons concerned. It agreed that the basic criterion should be the need for an "effective link" between the person concerned and the relevant State, and believed that the criteria set out in Part II of the draft articles fully met that need. The provisions dealing with cases where an individual could acquire the nationality of several concerned States were also to be welcomed. His delegation did, however, have

some reservations about some details of the provisions in Part II.

57. The wording of draft articles 20, 22, subparagraph (a), and 24, subparagraph (a), should clearly reflect that their applicability of those articles extended to concerned persons who had their habitual residence in the concerned State "on the date of the succession of States". Draft articles 22, paragraph (b) (i), and 24, paragraph (b) (i), could also be improved. The text should read: "... connection with a constituent unit of the predecessor State, the territory of which has become the territory of the successor State or part of that territory". That would avoid the limitations on applicability contained in the aforementioned provisions.

58. Lastly, with regard to the form that the draft articles should take, his delegation favoured a convention and therefore endorsed the argument put forward by the representative of France the previous day. His delegation could accept that the draft articles should be adopted in the form of a declaration only on the understanding that in future they would be finalized in the form of a convention. It would not be the first time that such a course of action had been taken in relation to a human rights instrument.

59. **Mr. Hamid** (Pakistan), referring to the topic of reservations to treaties, said that it might be unwise to derail the existing regime of reservations established by the 1969 Vienna Convention on the Law of Treaties and subsequently confirmed in the 1978 Vienna Convention on the Succession of States in respect of Treaties and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations, as the rules encompassed therein had acquired the status of customary norms on the strength of their wide acceptance. Moreover, they succeeded in striking a balance between the objectives of preserving the text of the treaty and universal participation. He therefore did not favour establishing a separate regime for human rights treaties that did not permit reservations, as the objective of universal participation would be impaired. Likewise he did not favour the establishment of a monitoring body to determine the nature and validity of any reservations expressed, as it was States who should be responsible for ensuring that their reservations were consistent with the purposes and objectives of a given treaty. Nevertheless, he was not opposed to the clarification of any ambiguities in the Vienna Conventions by means of guidelines, provided that they in no way altered the existing regime of reservations.

60. While commending the efforts of the International Law Commission to balance the interests of States and individuals in avoiding statelessness, he said that the draft articles on nationality of natural persons in relation to the succession of States should not be seen as condoning dual nationality, which many States, including his own, did not recognize. Nor was he in favour of the option which gave individuals the right to choose their nationality after a succession had taken place, as it could give rise to conflicts between States. He therefore strongly supported the principle that a person who had the nationality of the predecessor State and who resided in the territory affected by the succession should acquire the nationality of the successor State on the date of the succession, with habitual residence as the vital factor linking the natural person and the successor State. He had no problems, however, with the provisions concerning the unity of family and also supported the proposal to adopt the draft articles in the form of a declaration.

61. He welcomed the provisional adoption of some of the draft articles on state responsibility, but expressed concern that draft article 1 could be interpreted to mean that any State could bring action against the defaulting State, whether or not it was affected by the so-called internationally wrongful act. In his view, only the affected State should be able to bring action, and only then if it could prove damage.

62. Turning to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, he agreed that every State had the right to engage in lawful activities within its territory so long as it complied with the obligation to ensure that its enjoyment of that right did not harm another State, failing which liability should be attached to it. He was not therefore averse to the inclusion in the draft articles on the topic of an illustrative list of activities which involved a risk of transboundary harm, since an exhaustive list would be difficult to compile. Since no provision had been made in the draft articles for a dispute settlement mechanism, he favoured deletion of the word "significant" before the words "transboundary harm". In the event of harm, the aggrieved State should be entitled to compensation from the State from which the harm emanated.

63. On the question of diplomatic protection, he noted that unfortunate incidents involving diplomatic personnel and missions had recently taken place in various countries, even though the receiving States had complied with their obligations under the relevant conventions to take all necessary precautions to safeguard the lives and property of diplomatic agents, including the premises of diplomatic missions. It was therefore important that diplomatic missions should also observe the rules and regulations formulated by the host country with a view to the protection of such personnel and property.

64. Lastly, he expressed his full support for close cooperation between the Commission and other legal bodies, such as the Asian-African Legal Consultative Committee. Meaningful dialogue should also be strengthened between the Sixth Committee and the Commission, whose report should be made available in time for Governments to examine it and formulate their policies with a view to enhancing the Committee's input. It was inadvisable to specify a definite time-frame for the Commission's sessions, which could be split if the workload so demanded.

Agenda item 159: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/54/L.3)

65. **Mr. Raichev** (Bulgaria), introducing draft resolution A/C.6/54/L.3 on behalf of the original sponsors, who had been joined by Nigeria, said that the text was largely based on that of General Assembly resolution 53/107 and reflected current developments relating to implementation of the provisions of the Charter of the United Nations related to assistance to third States affected by the application of sanctions, with a view to obtaining general support. Only a few minor changes had been made to the preamble and paragraph 4. Paragraph 5, which was new, was based on the text of the recommendation of the Special Committee contained in paragraph 33 of its report (A/54/33), while paragraph 7 referred to the decision to transmit the most recent report of the Secretary-General on the subject (A/54/383) to the Economic and Social Council in the belief that the Council would benefit from the views contained in the report when considering the conclusions and findings of the ad hoc expert group. Under paragraph 9, the Secretary-General's report was to be transmitted also to the Special Committee for its consideration, while under paragraph 10, the General Assembly would decide to establish a working group of the Sixth Committee at the fifty-fifth session of the General Assembly, since the sponsors believed that such a group would constitute the most appropriate forum for the consideration and analysis of further progress in the elaboration of effective measures in connection with the subject. He hoped that the text would be adopted by consensus.

The meeting rose at 12.40 p.m.

United Nations A/C.6/54/SR.18

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Summary record of the 18th meeting
Held at Headquarters, New York, on Wednesday, 27 October 1999, at 3 p.m.

Chairman: Mr. Mochochoko ..... (Lesotho)
later: Ms. Hallum (Vice-Chairman) ..... (New Zealand)

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Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

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99-81947 (E)

The meeting was called to order at 3.15 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Galicki** (Chairman of the International Law Commission), introducing Chapter VII of the report of the Commission (A/54/10 and Corr.1 and 2), on jurisdictional immunities of States and their property, said that the General Assembly, in its resolution 53/98 of 8 December 1998, had decided to establish at its fifty-fourth session a working group of the Sixth Committee to consider outstanding substantive issues related to the draft articles on jurisdictional immunities of States and their property. The report of the Working Group was annexed to the report of the Commission, which had adopted the suggestions contained in it; consequently, the suggestions should be regarded as the Commission's own suggestions.

2. Paragraphs 10 to 30 of the Working Group's report referred to the "concept of State for purpose of immunity", and paragraphs 22 to 30 contained the Commission's suggestions on that subject. As explained in paragraph 11, under paragraph 1 (b) (ii) of article 2 of the draft adopted on second reading by the Commission "constituent units of federal States" fell within the definition of a "State" for the purposes of the draft articles. That provision had been the subject of controversy between federal States and non-federal States, particularly with regard to the problem resulting from the potential dual capacity of constituent units to exercise governmental authority on behalf of the State or on their own behalf, pursuant to the distribution of public power between the State and its constituent units according to the relevant constitution. The discussions had focused on whether constituent units of federal States should, through their inclusion in the notion of "State", be entitled to the immunity of the State without any additional requirement, when they were acting on their own behalf and in their own name.

3. When examining that issue, some members of the Working Group had felt that there should be a parallelism between the provision concerning the "concept of State for purpose of immunity" in the draft articles on jurisdictional immunity of States and the draft articles on State responsibility. Although some members had felt that it was not necessary to establish a full consistency between the two sets of draft articles, it was considered desirable to bring that draft article into line with the draft on State responsibility.

4. The Commission suggested the deletion of paragraph 1 (b) (ii) of draft article 2 so that the element "constituent units of a federal State" would join "political subdivisions of the State" in current paragraph 1 (b) (iii). Furthermore, the Commission suggested that the qualifier phrase "which are entitled to perform acts in the exercise of the sovereign authority of the State" could apply both to "constituent units of a federal State" and to "political subdivisions of the State". The Commission also suggested that the phrase "provided that it was established that that entity was acting in that capacity" should be added to the paragraph, between brackets for the time being.

5. A final suggestion by the Commission concerning article 2 was that the expression "sovereign authority" in the qualifier should be replaced by the expression "governmental authority", to align it with contemporary usage and the terminology used in the draft articles on State responsibility. Such suggestions allowed for the immunity of constituent units, while at the same time addressing the concern of States that found the difference in treatment between the constituent units of Federal States and political subdivisions of the State confusing. Paragraph 30 of the Working Group's report showed how a reformulation of paragraph 1 (b) of article 2 would read if the Commission's suggestions were to be adopted.

6. Paragraphs 31 to 60 of the Working Group's report dealt with criteria for determining the commercial character of a contract or transaction, and paragraphs 56 to 60 contained the Commission's suggestions on that issue. As explained in paragraph 32 of the Working Group's report, paragraphs 1 (c), 2 and 3 of article 2 of the Commission's draft took the view that a State enjoyed restricted immunity, namely that jurisdictional immunity should not be enjoyed by a State undertaking a commercial activity. That restrictive approach raised as one of the main issues that of the definition of "commercial transaction" for the purpose of State immunity. In that respect, while some States considered that only the nature of the activity should be taken into account in determining whether it was commercial or not, other States considered that the "nature" criterion alone did not always permit a court to reach a conclusion on whether an activity was commercial or not. Therefore, recourse must sometimes be made to the "purpose" criterion, which examined whether the act had been undertaken with a commercial or a governmental purpose. Although several different proposals had been made as to how to integrate the two tests, no common solution had emerged from that practice. Paragraph 1 (c) and paragraph 2 of article 2 constituted an attempt to integrate the two criteria but it had so far met with some resistance on the part of States.

7. In its suggestions, the Commission made it clear that the issue of which criteria to apply in order to determine the commercial character of a contract or transaction arose only if the parties had not agreed on the application of a specific criterion and the applicable legislation did not require otherwise. The Commission further indicated that the criteria contemplated in national legislation or applied by national courts offered some variety, including, *inter alia*, the nature of the act and its purpose or motive, as well as some other complementary criteria such as the location of the activity and the circumstances of the act.

8. The Commission had indicated all the possible alternatives examined by the Working Group when considering the issue, namely: (a) the nature test as the sole criterion; (b) the nature test as a primary criterion (in which case the second half of article 2, paragraph 2, would be deleted); (c) the nature test supplemented by the purpose test with a declaration by each State about the internal legal rules or policy it would apply in that area; (d) the nature test supplemented by the purpose test; (e) the nature test supplemented by the purpose test with some restrictions on the extent of "purpose" or with some enumeration of "purposes". Such restrictions or enumeration should be broader than a mere reference to some humanitarian grounds; (f) reference in article 2 only to "commercial contracts or transactions", without further explication; and (g) adoption of the approach followed by the Institut de Droit International in its 1991 recommendations, which were based on an enumeration of criteria and a balancing of principles, in order to define the competence of the court in relation to jurisdictional immunity in a given case. The text of the Institut de Droit International was to be found in a note appended to the Working Group's report.

9. After considering the matter, and in view of the differences of the facts in each case and different legal traditions, the Commission had decided that alternative (f), namely, the deletion of paragraph 2, was the most acceptable, since the distinction between the nature and purpose tests might be less significant in practice than the long debate on that subject might imply. It had also decided that some of the criteria contained in the draft article proposed by the Institut de Droit International could offer useful guidance to national courts and tribunals in determining whether immunity should be granted in specific instances.

10. Paragraphs 61 to 83 of the Working Group's report dealt with the concept of a State enterprise or other entity in relation to commercial transactions, and paragraphs 78 to 83 contained the Commission's suggestions on that issue. Paragraph 3 of article 10 of the draft adopted by the Commission in 1991 provided that the immunity from jurisdiction enjoyed by a State should not be affected with regard to a proceeding which related to a commercial transaction engaged in by a State enterprise or other entity established by the State which had an independent legal personality and was capable of: (a) suing or being sued, and (b) acquiring, owning or possessing and disposing of property, including property which the State had authorized it to operate or manage.

11. That provision had caused some reaction in the Sixth Committee in previous years. It had been felt that, in exceptional cases, it might be appropriate to disregard the separate legal personality of a State enterprise or other entity. For instance, a State enterprise might conclude a commercial transaction on behalf of the Government or execute it as the authorized agent of the State. In such cases, the contract might be regarded as a transaction between the State and the private party, and the State should not be able to invoke immunity. It had also been argued that a State should not be able to invoke immunity in cases where it was acting as a guarantor of an entity, and that it should also be held accountable when a State entity had deliberately misrepresented its financial position or had subsequently reduced its assets to avoid satisfying a claim.

12. The Chairman of the informal consultations held in 1994 had suggested, as a possible basis for compromise, that article 10, paragraph 3, could be clarified by indicating that the immunity of a State would not apply to liability claims in relation to a commercial transaction engaged in by a State enterprise or other entity established by that State where: (a) the State enterprise or other entity engaged in a commercial transaction as an authorized agent of the State; (b) the State was acting as a guarantor of the liability of the enterprise; or (c) the State entity had deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim. That clarification could be achieved either by characterizing the acts referred to under (a) and (b) as commercial acts or by a common understanding to that effect at the time of the adoption of article 10.

13. The Commission had also considered the third ground for State liability suggested in the basis for compromise, namely, "where the State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim". The Commission had judged that the suggestion went beyond the scope of article 10 and addressed a number of questions: immunity from jurisdiction, immunity from execution and the question of the propriety of piercing the corporate veil of State entities in certain cases. Moreover, it did not take into account the question of whether the State entity, in so acting, acted on

its own or on instruction from the State. The Commission had noted that the idea of piercing the corporate veil raised questions of a substantive nature and questions of immunity, but had not considered it appropriate to deal with them in the framework of its current mandate.

14. Paragraphs 84 to 107 of the Working Group's report referred to contracts of employment, and paragraphs 103 to 107 contained the Working Group's and the Commission's suggestions on that issue. Article 11, paragraph 1, of the draft adopted by the Commission in 1991 laid down the general principle that, unless otherwise agreed between the States concerned, a State could not invoke immunity from jurisdiction before a court of another State which was otherwise competent in a proceeding which related to a contract of employment. Paragraph 2 listed the exceptions to that principle, including the exception in subparagraph (a) concerning an employee who had been recruited to perform functions closely related to the exercise of governmental authority and that in subparagraph (c) concerning an employee who was neither a national nor a habitual resident of the State of the forum at the time when the contract had been concluded.

15. Those two exceptions to the principle had elicited divergent views in the Sixth Committee in previous years and, in particular, in the informal consultations in 1994. Paragraph 87 of the Working Group's report recalled that, with regard to subparagraph (a), there had been a question as to whether the phrase "closely related to the exercise of governmental authority" was sufficiently clear to facilitate its application by courts. With regard to subparagraph (c), it had been suggested that the provision could not be reconciled with the principle of non-discrimination based on nationality. The Chairman of the 1994 informal consultations had proposed clarifying the phrase contained in subparagraph (a) and deleting subparagraph (c) in the light of the principle of non-discrimination.

16. After careful consideration, the Commission had made a number of suggestions. In subparagraph (a) of paragraph 2, the Commission had suggested that in the phrase "perform functions closely related to the exercise of governmental authority" the words "closely related to" could be deleted in order to restrict the scope of the subparagraph to "persons performing functions in the exercise of governmental authority". It had also been agreed that the subparagraph could be further clarified by stating clearly that paragraph 1 of article 11 would not apply if the employee had been recruited to perform functions in the exercise of governmental authority; that meant in particular: (i) diplomatic staff and consular officers, as defined in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations; (ii) diplomatic staff of special missions and permanent missions to international organizations; and (iii) persons enjoying diplomatic immunity, such as persons recruited to represent a State in international conferences.

17. With regard to article 11, paragraph 2 (c), the Commission had recommended that it should be deleted, as it could not be reconciled with the principle of non-discrimination based on nationality. Such deletion, however, should not prejudge on the possible inadmissibility of the claim on grounds other than State immunity, such as the lack of jurisdiction of the forum State. In that regard, the Commission had noted a possible uncertainty in paragraph 1 of article 11, concerning the meaning of the words "in part". The Commission believed that it might be desirable to reflect explicitly in article 11 the distinction between the rights and duties of individual employees and questions of the general policy of employment, which essentially concerned management issues of the employing State.

18. Paragraphs 108 to 129 of the Working Group's report referred to the issue of "measures of constraint against State property", and paragraphs 125 to 129 contained the suggestions of the Group and the Commission on that issue. The draft articles adopted in 1991 made a clear distinction between immunity from jurisdiction and immunity from measures of constraint. With regard to the latter, article 18 established the general principle that no measures of constraint, such as attachment, arrest and execution, against property of a State might be taken in connection with a proceeding before a court of another State unless: (a) the State had consented; (b) the State had allocated or earmarked property for the satisfaction of the claim which was the object of the proceeding; or (c) the property which was the object of a measure of constraint was specifically in use or intended for use by the State for other than government non-commercial purposes and was in the territory of the State of the forum and had a connection with the claim which was the object of the proceeding or with the agency or instrumentality against which the proceeding was directed. For its part, article 19 listed the categories of property of a State which should not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes.

19. The consideration by the Sixth Committee of those provisions had raised a number of problems in recent years. There were different views as to whether the exercise of jurisdiction by a court in proceedings to determine the merits of a claim against a foreign State implied the power to take measures of constraint against the property of that State with a view to satisfying a valid judgement confirming the claim.

Even if such a power was recognized, there were also different views as to which property might be subject to measures of constraint. Any attempt to reconcile the different views on those issues would need to take into account the interests of a State in minimizing the interference with its activities resulting from coercive measures taken against its property as well as the interests of a private party in obtaining satisfaction of a claim against a foreign State that had been confirmed by an authoritative judicial pronouncement.

20. Paragraph 118 of the Working Group's report set out the possible basis for a compromise. For its part, the Commission was of the view that a distinction between prejudgement and post-judgement measures of constraint might help sort out the difficulties inherent in that issue, even though both types of measures were subject to the conditions of article 19 concerning property for government non-commercial purposes.

21. With regard to prejudgement measures of constraint, the Commission was of the view that they should be possible only in the following cases: (a) measures on which the State had expressly consented either ad hoc or in advance; (b) measures on property designated to satisfy the claim; (c) measures available under internationally accepted provisions (*leges specialis*), such as, for instance, ship arrest, under the Brussels International Convention relating to the arrest of seagoing ships; and (d) measures involving property of an agency enjoying separate legal personality, if it was the respondent of the claim. The Commission believed that the above list might not be exhaustive.

22. With regard to post-judgement measures of constraint, the Commission was of the view that they should be possible only in the following cases: (a) measures on which the State had expressly consented either ad hoc or in advance; and (b) measures on designated property to satisfy the claim. That list, too, might not be exhaustive. Moreover, the Commission had explored three alternatives which the Assembly might decide to follow. The first alternative might consist of granting to the State a grace period of two to three months to comply with the judgement as well as freedom to determine property for execution. If no compliance occurred during the grace period, property of the State could be the object of execution, subject to article 19. The first element of the second alternative was the same as that of the first alternative. If, however, no compliance occurred during the grace period, the claim would be brought into the field of inter-State dispute settlement; that would imply the initiation of dispute settlement procedures in connection with the specific issue of execution of the claim. Lastly, the Assembly might decide not to deal with that aspect of the draft, because of the complex and delicate aspects of the issues involved. The matter would then be left to State practice. The title of the topic and of the draft would be amended accordingly.

23. Lastly, the report contained in an appendix a short background paper on another issue which might be relevant for the topic of jurisdictional immunities. It concerned the question of the existence or non-existence of jurisdictional immunity in actions arising, *inter alia*, out of violations of *jus cogens* norms; rather than taking up the question directly, the Working Group had decided to bring it to the attention of the Sixth Committee.

24. **Ms. Hallum** (New Zealand), Vice-Chairman, took the Chair.

25. **Mr. Sepulveda** (Mexico) said that he would consider first the draft articles on nationality of natural persons in relation to the succession of States and then the draft articles on jurisdictional immunities of States. With regard to the first topic, he welcomed the fact that the Commission had completed the second reading in such a short time, but regretted that it had omitted the study of nationality of legal persons in relation to the succession of States; it believed that guidelines were needed on the subject. It was to be hoped, therefore, that the Commission would return to the question in due course.

26. Stressing that it was particularly important to guarantee to individuals the right to a nationality and to prevent statelessness in the case of a succession of States, his delegation fully supported the draft articles, to the extent that they preserved the rights of States in matters of nationality, while specifying their responsibilities under international law. His delegation also believed that the proposed form of the draft articles, a declaration, was consistent with the will of States.

27. His delegation noted that in the case of a succession of States a person could, under certain circumstances, be entitled to more than one nationality; like the Commission, however, it believed that the draft articles should not be understood as being intended to encourage multiple nationality.

28. Article 3, which provided that the draft articles applied only to the effects of a succession of States occurring in conformity with international law, embodied the fundamental principle of international law, namely, that unlawful acts should not produce legal effects. Paragraph 3 of the commentary on that article, in which the Commission stressed that article 3 was without prejudice to the right of everyone to a nationality in accordance with article 15 of the

Universal Declaration of Human Rights, seemed therefore to be pointless, and could even give the impression that a succession of States not in conformity with international law would compel recognition of the nationality of the persons affected by an unlawful act of that nature.

29. With regard to article 5 (Presumption of nationality), his delegation believed that, while the criterion of habitual residence was extremely useful, the Commission might have chosen, in addition, the principle of effective nationality, which was based on the existence of an effective link between the individual and the State.

30. The principle of respect for the will of persons concerned was satisfactory, for, while it took into account the importance of attribution of nationality for an individual, it left the final decision to the States concerned, which were obliged to take all appropriate measures, based on the links between them and the persons concerned, to prevent statelessness. In that connection, his delegation stressed that article 19 protected the right of other States not to recognize the nationality of a person who had no effective link with a State concerned. As his delegation had stated on several earlier occasions, effective link was one of the main criteria applied in resolving nationality questions in the context of succession of States. A third State could not, therefore, be obliged to accept an attribution of nationality that was not in conformity with the general principles of international law; moreover, the right of option enabled the person concerned to choose the nationality of the State with which he or she believed an effective link existed.

31. With regard to article 7, his delegation shared the view of the Commission that in the particular case of a succession of States, it was useful to be able to give retroactive effect to attribution of nationality. Such a derogation from the general principle of non-retroactivity of legislation, which was justified only by the risk of statelessness, even if only temporary, of persons concerned, should nonetheless retain its exceptional character.

32. Among the other positive aspects of the draft articles, his delegation stressed the reaffirmation of the principle of non-discrimination, the right to a nationality of a child born after the succession of States, the prohibition of arbitrary decisions concerning nationality issues and the need to preserve family unity. Lastly, his delegation believed that Part Two of the draft articles made it possible for those provisions to be applied in a flexible manner.

33. The Mexican delegation welcomed the progress made on the draft articles by the Working Group on Jurisdictional Immunities of States and their property, which should enable the Working Group of the Sixth Committee to resume consideration of pending issues. As the topic was to be considered separately by the Committee, his delegation would confine itself to a few general remarks. With regard to the concept of the State for the purposes of immunity, his delegation believed that the Working Group's proposals constituted a good basis for discussion. It would be desirable, nonetheless, to combine "constituent units of a federal State" and "political subdivisions of the State", and to retain only acts performed "in the exercise of the sovereign authority of the State". In that connection, the phrase currently appearing in brackets in the draft articles, namely, "provided that it was established that such entities were acting in that capacity", raised more problems than it solved. The criterion of "in the exercise of the sovereign authority of the State" seemed sufficient for the purposes of State immunity.

34. With regard to the criteria for determining the commercial character of a contract or transaction, the determining factor should be the character of the contract or transaction. Since, however, in accordance with the practice and jurisprudence of some States, the purpose of the contract or transaction was an important criterion, his delegation was willing to consider any formulation that would make it possible to include that concept in the draft, while promoting the objective of legal certainty. In that connection, the Working Group's proposal to delete article 2, paragraph 2, of the draft articles hardly seemed appropriate. If the possibility of determining the commercial character of a contract or transaction was left to the courts, the result in practice would be a multiplicity of regimes. His delegation believed that the question merited thorough consideration.

35. With regard to the concept of a State enterprise or other entity in relation to commercial transactions, his delegation believed that the Working Group's proposal was on the right track and deserved to be studied carefully. The State should not be able to invoke immunity in liability proceedings relating to a commercial transaction carried out by a State enterprise or other entity established by it if that entity had acted as an agent of the State, the transaction had a commercial character and the State had served as guarantor of the performance of the relevant obligation.

36. The Mexican delegation took note of the appendix to the report of the Working Group concerning recent developments related to immunities, especially insofar as peremptory norms of international law were concerned. Like the Commission, it believed that such questions were not dealt with directly in the draft articles on jurisdictional immunities of States and their property, but that the evolution of the principles referred to would have a major

impact on the international legal order and relations between States.

37. **Mr. Rebagliati** (Argentina) drew the attention of the Commission to three aspects of the topic of jurisdictional immunities of States and their property. In his view, the first issue dealt with by the Working Group, namely, the concept of a State for the purposes of immunity, raised problems of formulation rather than substance. As his delegation had stated on earlier occasions, the concepts of "constituent units of a federal State" and "political subdivisions of the State" were not clearly differentiated and appeared to overlap. His delegation therefore proposed the following wording, based on the Working Group's proposal: "constituent units of a federal State or other political subdivisions of the State called upon to exercise sovereign authority".

38. With regard to the sensitive question of the criteria to be applied in determining whether an activity was commercial or not, his delegation agreed with the Working Group that the distinction between the nature test and the purpose test was surely less problematic and controversial in practice than it was in theory. That was why his delegation believed, like the Working Group, that eliminating any reference to nature or purpose was the most acceptable solution. That had in fact been the solution adopted by Argentine legislation in 1994.

39. Lastly, his delegation wished to draw attention to the issue of immunity from execution. The draft articles should include provisions specifying the cases in which measures of constraint could be taken, in the context of judicial proceedings, against the property of a State. Without such provisions, the draft articles would have little impact. There was indeed little point in listing the cases in which a State could not oppose jurisdictional immunity if there were no provisions for enforcing the judgement. The number of cases should, of course, be limited, but they must be clearly identified. In that connection, his delegation found the distinction made by the Working Group between prejudgement and post-judgement measures of constraint to be useful and considered the proposed cases of exclusion from immunity from execution to be satisfactory. The contribution of the Working Group should facilitate the debate which would soon take place in the Sixth Committee and help to bring viewpoints together, thereby accelerating the holding of a conference for the drafting of a general convention on that important question.

40. **Mr. Lammers** (Netherlands) said that his country was aware of the problematic nature of the topic of jurisdictional immunities of States and their property, on which there was a considerable divergence of views among States. Sincere efforts should nevertheless be made to harmonize the rules of international law governing that topic as far as possible without jeopardizing the right of private parties to legal protection in their transactions with foreign States. It was in that spirit that his delegation wished to present its comments on the draft articles adopted in 1991, taking into account the work of the Working Groups established by the General Assembly in 1992 and 1993, and by the Commission in May 1999.

41. His delegation had taken note of the observation in paragraph 2 of the Commission's commentary on article 2 that the draft articles did not cover criminal proceedings. Perhaps it would be better to include that provision in article 1, which dealt with the scope of the articles. His delegation further wondered to what extent the draft articles would apply to civil law claims presented in connection with criminal proceedings.

42. In general, his delegation agreed with the definition of the concept of State for the purposes of immunity formulated by the Working Group in paragraph 30 of its July 1999 report. However, the bracketed text in article 2, paragraph 1 (b) (ii), should be replaced by the words "whenever performing such acts", and the same words should be added in paragraph 1 (b) (iii). His delegation also preferred a reference to "sovereign authority" to the term "governmental authority", which might be given too broad an interpretation.

43. The concept of "commercial transaction" appearing in article 2, paragraph 1 (c), and the criteria for determining whether a contract or transaction was a "commercial transaction" remained problematic. His delegation preferred the definition proposed by the Chairman of the 1993 Working Group, contained in paragraph 35 of document A/C.6/48/L.4, as it was more logical. The description of the criteria used to determine whether or not a transaction was commercial was even more problematic. In his country, case law hardly took into consideration the purpose of a transaction, and the text proposed in article 2, paragraph 2, of the draft articles would be a step back in comparison with existing Netherlands case law. Moreover, the reference to the practice of the State which was a party to the transaction would lead to the application of a double standard by the Netherlands courts, which would be difficult to explain to a private party. His delegation had taken note of the proposal made by the Working Group, given the existing diversity of State practice, to abstain from defining any criteria for determining whether or not a transaction was commercial.

44. With regard to proceedings in which State immunity could not be invoked (arts. 10 ff.), his delegation had

difficulty understanding the purpose and meaning of article 10, paragraph 3, which stated that a State's immunity from jurisdiction would not be affected with regard to a proceeding which related to a commercial transaction engaged in by a State enterprise or other entity established by the State to carry out exclusively commercial transactions which had an independent legal personality and met certain conditions. The paragraph should be deleted, as it stated the obvious and might lead to confusion.

45. With regard to article 11, concerning employment contracts, his delegation proposed deleting paragraph 2 (c) in order to avoid discrimination in treatment between non-nationals of the employer State who were not nationals or habitual residents of the forum State and non-nationals of the employer State who were nationals or habitual residents of the forum State. With regard to article 12, which dealt with proceedings for redress for injury or damage sustained in the territory of the forum State and caused by the activities of a State in the territory of the forum State, he noted that, according to paragraph 10 of the Commission's commentary, that article did not apply to situations of armed conflict. His delegation believed that that was an extremely important limitation and that it should be made explicit in article 12 or elsewhere in the draft articles. Attention might also be drawn in that connection to article 31 of the European Convention on State Immunity, which explicitly provided that nothing in that Convention should affect any State immunity in respect of acts of its armed forces when on the territory of another State. As currently worded, article 12 did not appear to cover cases of transboundary environmental damage, and he wondered why that was the case.

46. His delegation was basically satisfied with the current text of article 16, concerning ships owned or operated by a State, but believed that similar provisions should be added to cover aircraft owned or operated by a State. As to article 17, dealing with the effect of an arbitration agreement, there was no reason why its operation should be limited to differences relating solely to commercial transactions.

47. With regard to State immunity from measures of constraint, article 18 was much more restrictive than current case law of the Netherlands courts, and he hoped that the Commission would take a less restrictive approach. In particular, it should delete the requirement in paragraph 1 (c) that there must always be a connection between the property subject to a measure of constraint and the claim which was the object of the proceeding or with the agency or instrumentality against which the proceeding was directed. Article 19, defining specific categories of property which remained immune from measures of constraint, was useful. However the words "held by it for central banking purposes" should be added at the end of paragraph 1 (c).

48. His delegation had taken note with interest of the observations made by the Working Group on developments in the area of immunity from jurisdiction, in which immunity was denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition of torture. Recent developments which would also affect the scope of the present article 12 should be taken fully into account in further work on the draft articles.

49. **Mr. Berman** (United Kingdom) welcomed the fact that the Commission had completed its work on the topic of nationality in relation to the succession of States while avoiding its earlier excessive concentration on the problems of nationality raised by decolonization. He wondered, however, why the Commission had decided to recommend that the General Assembly should adopt the draft articles in the form of a declaration, when they were unmistakably normative and not declarative in their wording, and hoped that the Assembly would specify in its resolution why it was adopting the declaration. There seemed to be a lack of consistency between article 6, which required States to adopt legislation on nationality and related issues, and subsequent draft articles in which States were called upon to fulfil a variety of obligations; he wondered whether those obligations were supposed to be incorporated in national legislation or were to be fulfilled regardless of what the legislation provided. That aspect of the draft, in his view, required clarification. It would also be wise to clarify whether the provision in article 17 requiring effective review of decisions on nationality applied also to arbitrary deprivation of nationality, contemplated in article 16, and discrimination in matters of nationality, which was covered by article 15. Lastly, he agreed with the Commission that the silence on the part of Governments meant that they concurred that work on the topic of nationality in relation to the succession of States could be considered concluded, although the possibility of reopening the issue in the event that States expressed the desire to do so was not excluded. However, the humanitarian concerns which had guided the elaboration of the draft articles would not be applicable to the debate on the nationality of companies and commercial entities.

50. With regard to the jurisdictional immunities of States and their property, the Commission was still far from completing its work, despite the desire of lawyers for agreement on a code that would cover all aspects of the problem. In view of the rapid changes occurring in the system of international trade, it was appropriate to ask

whether the Commission should continue its work along the same lines and codify that important branch of international trade law at the risk of freezing it and limiting its scope to certain issues, thereby creating a gap between reality and law, or whether the Commission should instead be realistic, recognizing that State immunity was closely linked to the development of a modern system of international trade, and turn to the elaboration of a model law, which, without being binding, would allow States that wished to modernize their legislation to do so and would leave room for practice to develop. A model law would preserve the invaluable work that the Commission and the Sixth Committee had achieved in that area and would be an attractive way of completing the work on the topic.

51. **Mr. Kanehara** (Japan) said that although many years had passed since the General Assembly had first turned its attention to the draft articles on the jurisdictional immunities of States and their property submitted to it by the International Law Commission, the topic of State immunity had lost none of its importance for international law and continued to divide opinion among Member States, with some advocating more restrictive rules and others espousing absolute immunity. During the cold war era those differences had been understandable, but on the threshold of the twenty-first century they no longer had a rationale. The fading of the system of State-controlled economies, rather than limiting the scope of State activities, had in fact coincided with an extension of the public sphere to many branches of the private sector as a result of changes in the nature of the State. Those changes had undermined the doctrine of absolute immunity. It was the task of the Sixth Committee to follow up on the work done by the Commission, particularly the Working Group on the topic, and to give legal expression to the new forms the conduct of the State might take in the future by formulating a universally acceptable, restricted doctrine of immunity. It was regrettable that the Sixth Committee had allocated only three days to the topic, whereas at least one week of debate would be necessary to consider it properly. If the Sixth Committee did not have enough time, it might wish to consider sending the issue back to the Commission.

52. One of the thorniest issues in the debate on State immunity was the criteria for determining the commercial character of a contract or transaction under article 2, with the debate centring on whether the nature test or the purpose test should prevail. His delegation doubted whether that debate was actually useful to the judges who would render decisions in that area; in view of the diversity of State practice, it might be wiser to recognize that international law in that area was still evolving, without trying to decide which practices were too radical or too conservative. The aim of the Sixth Committee should be to offer guidance, not to freeze the development of that branch of law. There were two possible solutions. The first was to end the debate on the nature and purpose tests and to delete article 2, paragraph 2, as the Commission's Working Group had suggested. In that case it would be appropriate to add a provision reducing the scope of paragraph 1 (c) (iii) to reflect the rule of international law that the determining factor in the attribution by national judges of immunity to foreign States should be the commercial character of a contract or transaction. In that connection, the approach taken by the Institut de Droit International in its 1991 recommendations, which contained a list of criteria and balanced various principles, could offer useful guidance. The second solution would be to accord primary status to the nature test and supplementary status to the purpose test, depending on the legal tradition or policy of each State.

53. Measures of constraint was another difficult issue which the Commission must examine in depth, since there was no established rule of law in that area. While it was possible to bring proceedings against a foreign State in a national court, it was not easy to enforce judgements against it. Great prudence must be exercised in enforcing judgements against a State: efforts must be made to convince the State to execute the judgement voluntarily, and it should be given a period within which to comply before any measures of constraint were contemplated, although at present no national legal system seemed to have such a provision. Moreover, as the Working Group had noted, even greater caution was required when a national court dealt with prejudgement measures, since they were taken before any ruling on the merits of the case was made.

54. With regard to the concept of a State enterprise in relation to commercial transactions, he noted it was true that some State enterprises were financially independent and legally separate from the State and that denying them immunity did not imply a denial of State immunity; however, there were cases, as the Working Group had rightly noted, in which the State could not invoke immunity, such as when a State enterprise engaged in a commercial transaction as an authorized agent of the State or when the State was acting as guarantor of an enterprise.

55. With regard to contracts of employment, inasmuch as article 11 of the draft articles attempted to reconcile the interests of the foreign State and those of the forum State, his delegation appreciated the Commission's efforts to clarify paragraph 1 (a). It concurred with the Working Group that paragraphs 1 (c) and 1 (d) were contrary to the principle of non-discrimination based on nationality and should

therefore be deleted. Nationality did not provide grounds for denying legal protection or the right to bring a claim against a State, particularly when the interested party was a permanent resident of the forum State.

The meeting rose at 5.10 p.m.

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Chairman: Mr. Machochoko ..... (Lesotho)

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Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

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The meeting was called to order at 10.20 a.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Kerma** (Algeria) said that the new proposals of the Commission's Working Group on jurisdictional immunities of States and their property concerning the concept of State for purposes of immunity, having taken account of the diverse positions on the subject, were likely to diminish the difficulties previously associated with that definition, thus opening the way for a possible decision on the matter. The formula suggested by the Working Group in connection with the criteria for determining the commercial character of a contract or transaction was likely to receive general approval, attempting as it did to strike a balance between the nature criterion and the purpose criterion. He hoped, however, that such a compromise on that crucial point would not lend itself to varying interpretations, thereby conflicting with the objectives of codifying the law on the subject. Similarly, the suggestions of the Working Group concerning the concept of a State enterprise or other entity in relation to commercial transactions smoothed away the related difficulties by successfully bringing together the different positions on that issue. As for the fundamental question of measures of constraint against State property, he reiterated his position that to accord a State the same treatment as an individual before a foreign court, thereby reducing its status, called into question the established principle of international law of immunity from measures of constraint, which was a corollary of the principle of State sovereignty. A lax solution to the problem would simply create difficulties between States, particularly if interim measures of protection or prejudgement measures of constraint, both of which he deemed inappropriate, were permitted. The interesting new proposals of the Working Group, however, could serve as a basis for further thought with a view to bridging the gap between the initial positions expressed on the sensitive issue in question and finding an acceptable compromise.

2. The appendix to the report of the Working Group (A/54/10, annex) concerned the important question of whether jurisdictional immunity existed in the case of violations of norms having the character of *jus cogens*, taking into account the recent developments of State practice and other factors related to the issue. Bearing in mind the sensitivity of the matter, however, he believed that a discussion of the issue in the context of the jurisdictional immunities of States would be premature.

3. In conclusion, he said that the suggestions of the Working Group were generally balanced and realistic and should thus help to eliminate any apprehensions concerning the conclusion of an international convention on jurisdictional immunities of States and their property. Given the importance and complexity of the topic, however, it was important to take into account the concerns of all categories of States, bearing in mind the diversity of legal systems, the legitimate interests involved and the economic interests of each category.

4. **Mr. Abraham** (France) said that the draft articles on jurisdictional immunities of States and their property constituted an acceptable basis for the elaboration of a convention that would be very useful in limiting the multiplication of national legal rules on the subject and in clarifying and supplementing international law. However, various technical and drafting aspects of the draft articles required further attention from the working group established by General Assembly resolution 53/98, which he hoped would be able to meet for a longer period during the year 2000. In regard to the concept of State for purposes of immunity, he questioned the meaning of draft article 2, paragraph 1 (b) (iii), which, in his view, might overextend the concept of immunity. He was satisfied with draft article 2, paragraph 2, in that it took into account the criterion of the purpose of a contract or transaction, and also welcomed draft article 11, on contracts of employment, whereby a State could invoke jurisdictional immunity if the contract was related to the exercise of governmental authority. He wished to point out, however, the general practice in France whereby a foreign State could invoke such immunity only if the beneficiary of the contract worked in the civil service and exercised particular responsibilities in that service. As for measures of constraint against State property, the French practice was similar to that mentioned by the Working Group. In other words, French courts were reluctant to order measures of constraint against State property that was essential to the exercise of sovereign functions. Such measures could be taken, however, against State property that was used in an economic or commercial activity which came under private law.

5. He noted with regret that virtually all the decisions mentioned in the summary of recent relevant case law referred to in paragraph 18 of the report of the Working Group had been delivered by common law courts. They therefore did not fully reflect international practice and he wished to transmit to the Secretariat information concerning decisions pronounced by French courts during the period covered, together with references to works which described

French practice in regard to jurisdictional immunities of States and their property.

6. **Mr. Leanza** (Italy), referring to the question of specific issues on which comments would be of particular interest to the Commission, said that it would be useful to take into account the results of debates on themes relating to international law conducted by international organizations other than the United Nations, particularly since the concept of State practice should include both the practice of individual States and the collective practice of States.

7. On the topic of nationality of natural persons in relation to the succession of States, he remarked that the draft articles would promote uniformity and establish a set of fundamental legal principles. In particular, they would not exclude the attribution of nationality from the internal jurisdiction of States, but would limit the discretionary power of States in that connection with the aim of protecting the right to nationality, which was an issue of substantial importance in view of the civil and political rights attached to it. In fact, the focus on the protection of human rights was one of the merits of the draft articles, the original version of which had been simplified and brought into line with other conventions in order to avoid contradictions.

8. With regard to the specific changes made in the draft articles, it had been appropriate to move former article 27, limiting the application of the articles to a succession of States occurring in conformity with international law, to the position of article 3, next to other articles of a similarly general nature. Less welcome was the deletion of former article 19, since its removal seemed to place parts I and II on the same footing, whereas there was in fact a clear hierarchy, part I containing the general principles and part II the application of those principles to specific circumstances.

9. His delegation fully supported the changes made in article 7 (formerly article 6) concerning the retroactive attribution of nationality to the date of succession for persons who would otherwise be stateless. The right to a nationality was so fundamental that it justified derogation from the general legal principle of non-retroactivity.

10. In general, his delegation was pleased at the changes made with the aim of simplifying and clarifying the wording of the articles. In codifying international law, exhaustive detail tended to reduce legal certainty. Moreover, the Commission had managed to adhere to its specific task of addressing the effects of the succession of States on nationality and had avoided the temptation to draft a text on the succession of States in general or a text on the right to a nationality. That appeared to be the thinking behind the re-wording of articles 16, 20, 22 and 24.

11. The Commission had recommended to the General Assembly that the draft articles should be adopted in the form of a declaration. His Government generally preferred the adoption of a convention open to signature or subsequent accession by States. In the present case, since the draft articles were essentially intended for the protection of human rights, it was all the more important to make an effort to adopt them as an international agreement, in order to underline the binding nature of the provisions and the need for legal certainty. Furthermore, whereas some other drafts developed by the Commission were closely linked with conventions already adopted or in force, so that they could appropriately take the form of a declaration or guidelines, the draft articles on nationality and State succession stood alone.

12. His Government was not in favour of abandoning the question of the nationality of legal persons in relation to the succession of States. The growing phenomenon of multinational companies made it essential for the Commission to be involved in the development of international law in that field.

13. With regard to jurisdictional immunities of States and their property, it was clear that since the Second World War the general trend in State legislation and practice had been to turn away from the tradition of absolute immunity and restrict the civil immunity of States. That change had come about as States increasingly engaged in economic activities *jure gestionis* in addition to their traditional sovereign or governmental activities *jure imperii*. The distinction, however, was often difficult to apply. The draft articles on jurisdictional immunities of States and their property adopted by the Commission on second reading in 1991 needed to be reformulated with a view to achieving greater clarity and closer correspondence to current international practice.

14. The suggestion of the Commission's Working Group on the topic to delete any reference to the nature or purpose of State activities in determining whether the activities should be considered commercial transactions, and thus subject to the internal jurisdiction of another State, touched upon one of the most controversial points in the entire draft. The 1991 text, in an attempt at compromise, had included a purpose test as a supplementary criterion. That solution was not truly satisfactory, because it introduced an element of subjectivity; it could lead to the extension of immunity beyond the limit recognized under current international law and would thus be a step backwards. Eliminating any reference to nature or purpose, however, would not guarantee that uniform objective criteria would be applied, despite the guidance available to national courts in the

recommendations of the Institut de Droit International. The choice not to define any criteria for identifying commercial transactions ought at least to be made in a consistent context compatible with the basic rationale for recognizing restrictive immunity, namely, the distinction between activities *jure imperii* and *jure gestionis*.

15. With regard to the topic of State immunity from measures of constraint, particularly execution against property of a State, in the light of the fundamental distinction between activities *jure gestionis* and *jure imperii*, the court should be able to proceed without limitation against property not destined for the fulfilment of sovereign functions. It might be appropriate, as the Working Group had suggested in alternative I, to grant the State a grace period of two or three months to designate property available for execution, thereby avoiding doubts as to the intended use of the property. If the State did not comply within the grace period, it would be for the national court to ensure that execution was not levied against property destined for the fulfilment of sovereign functions. There was no reason to resort automatically to inter-State dispute settlement, as suggested in alternative II.

16. Since it was the nature of the activity that determined whether immunity applied, commercial transactions should not be immune from local jurisdiction even in the case of transactions between States; the exception to that effect should be eliminated from the draft articles.

17. In the case of contracts of employment, his delegation agreed with the suggestion of the Working Group that the provision excluding local jurisdiction when the employee was neither a national nor a habitual resident of the State of the forum should be deleted, as contrary to the principle of non-discrimination based on nationality.

18. Since the draft articles were intended as a guide for national courts, his delegation shared the view that the provisions relating to constituent units of federal States and political subdivisions of States needed to be re-worded for the sake of clarity. The definition of a State for purposes of State immunity should not differ widely from the definition for purposes of State responsibility. For that reason, he could concur with the suggestion of the Working Group to refer to "governmental authority" rather than "sovereign authority". However, the proposed new wording specifically mentioned "constituent units of a federal State and political subdivisions of the State", whereas the State responsibility articles did not. His delegation felt that the most appropriate solution would be the one adopted by the European Convention on State Immunity, whereby the immunity of a constituent unit could be recognized on the basis of a declaration by the State. That approach would allow greater flexibility, in the light of differences between national systems, while facilitating application of the provisions by national courts.

19. **Mr. Andrews** (United States of America), referring to chapter IV of the report, said that the completed draft admirably addressed the sometimes complex nationality issues that arose in succession situations, by placing emphasis on ensuring that individuals in such situations did not find themselves without any nationality. His delegation's experts on nationality matters were giving it careful consideration.

20. While the Commission had done its work with the experience of the former Soviet Union and Eastern Europe fresh in mind, current developments elsewhere were a reminder that the issues involved were recurring ones, so that any text must be appropriate for the full range of possible situations.

21. For the most part, the articles articulated useful rules of general applicability. The overall approach of ensuring that all persons concerned had at least one nationality of a surviving State, while permitting States concerned to adopt measures to limit multiple nationalities, was sound. The articles also gave appropriate weight to the criterion of habitual residence of persons concerned.

22. His delegation was examining with particular interest the provisions identified by the Commission as areas of progressive development. In general, they were a step in the right direction. There were, however, some matters of potential concern. One involved the narrow issue of the treatment of stateless persons by third countries and the meaning of draft article 19. There should be no implication that a third country could not deport a stateless person to a successor State whose nationality he could acquire. There was also a need to reflect on issues of rights of habitual residence and their bearing on attribution of nationality and on the implications of limiting the articles to situations of succession in accordance with international law, and to ensure that successor States implemented nationality rules in a harmonious way. Nationality protection might be of greatest importance to persons involved in irregular situations. Lastly, his delegation recognized a right of expatriation, even if it resulted in statelessness. United States law also made it possible to revoke fraudulently obtained naturalization, even if the individual became stateless as a result.

23. His delegation looked forward to further work with a view to implementing the Commission's recommendation

to the General Assembly that the text should be adopted as a formal declaration.

24. Turning to chapter V of the report, he said that while the Commission's work on the topic of State responsibility had the potential to play a historic role in the codification and progressive development of international law, the success of that work was not yet guaranteed.

25. His delegation particularly appreciated the Commission's way of grappling with difficulties that many Governments, including his own, had noted in their comments. Many members of the Commission appeared to agree that the articles would have a lasting impact only if they were crafted in such a way as to be widely acceptable to States and to mirror State practice.

26. His delegation commended the Special Rapporteur on his proposals for simplifying and clarifying part 1. Nevertheless, given the complexity of the issues, the United States delegation wished to study the proposed revisions to part 1 more carefully.

27. With regard to the specific issues raised in paragraph 29 of the report, his delegation had four points to make.

28. First, a distinction should be drawn between those States specifically injured by an internationally wrongful act and other States which had a legal interest in the performance of the relevant obligations, but did not suffer economically quantifiable injury. Most treaty regimes and legal norms provided that only the specifically injured State should have the right to seek reparations. The draft articles should reflect that principle.

29. Secondly, it was a long-established principle of customary international law that a wrongdoing State must provide compensation to the specifically injured State. Both State practice and the literature supported the principle that such compensation included interest in addition to the principal amount; otherwise, the injured State could not be made whole. In order for current draft article 44 (Compensation) to reflect existing law, it should provide that interest "shall", rather than "may", be included in any compensation award.

30. Thirdly, with regard to countermeasures, his delegation welcomed the Commission's recognition that they played an important role in the regime of State responsibility; it believed, however, that the draft articles in part II contained unwarranted restrictions on their use. If the current text was substantially revised to address the concerns expressed by his delegation in its written comments, it might be desirable to include provisions on countermeasures in the draft articles, although not necessarily in part II. Countermeasures were an extremely important issue, and the Commission must find a satisfactory solution regarding them if the draft articles were to be generally acceptable.

31. Lastly, questions that arose when several States were involved in producing an internationally wrongful act should be dealt with in the framework of the draft articles. Assistance to another State should constitute a wrongful act where the assisting State intended to assist in the commission of the act. Accordingly, his delegation supported the Special Rapporteur's proposed revision to draft article 27, incorporating an intent requirement.

32. On the topic of reservations to treaties (A/54/10, chap. VI), his delegation found great merit in the Commission's concept of a Guide to practice, rather than a more formal document. The work on reservations properly recognized and built upon the strengths of the universal regime of reservations under the Vienna Convention on the Law of Treaties.

33. With regard to chapter VII of the report, since the Commission's completion of the draft articles on jurisdictional immunities of States and their property in 1991, the Committee had never come close to consensus on either the draft articles or possible revisions to them. As reflected in the report of the Working Group on jurisdictional immunities of States and their property (A/54/10, annex), the Commission had devoted substantial effort at its most recent session to considering the core issues.

34. By presenting alternative options on provisions dealing with commercial transactions and measures of constraint against State property, the Commission had provided useful focal points for discussion in the Working Group of the Sixth Committee. Unfortunately, it was also clear that State practice in the key areas of disagreement remained widely divergent. While his delegation looked forward to discussing those issues in the Working Group, it questioned whether agreement could be reached in the near future.

35. As to chapter VIII of the report, his delegation remained concerned about certain aspects of the topic. It did not believe that the rules of the Vienna Convention on the Law of Treaties provided an appropriate framework for analysing the legal effects of unilateral acts.

36. Lastly, with regard to chapter IX of the report, his delegation concurred with the Commission's decision to suspend work on international liability, pending the completion of its second reading of the draft articles on prevention of transboundary damage from hazardous activities.

37. Notwithstanding the difficulty of the task and the time that had been required, his delegation believed that the Commission had made useful contributions in that area since beginning its work in 1978. The Commission had done a comprehensive and thorough review of the issue of prevention and the obligation of due diligence.

38. Following the completion of the second reading and the submission to Governments of any resulting text, a pause in the Commission's work might be appropriate in order for international practice to develop in that area. His Government believed that international regulation in the area of liability should proceed through careful negotiations on particular topics, such as oil pollution or hazardous wastes, or in particular regions, and not by attempting to develop a single global regime. Once State practice had developed further, the Commission might be asked to resume its work in the light of the precedents established.

39. **Mr. Pham Truong Giang** (Viet Nam), referring to chapter VII of the report, said that the topic of jurisdictional immunities was of great interest to his delegation. Rapid economic and commercial development and globalization had brought various actors into play, including States, entities and individuals. The question of whether States were entitled to absolute or restrictive immunity in their economic and commercial transactions remained controversial. The attention of the international community was increasingly drawn to the elaboration of an international legal framework governing such activities in accordance with international law and practice. His delegation was highly appreciative of the results achieved by the Working Group of the Commission in that area.

40. Nevertheless, his delegation believed that business transactions, the key element of the text, should be defined clearly. Accordingly, the objective and nature of such transactions must be taken into consideration. Equality between the entities participating in commercial activities must be ensured, and the practice of developing countries should be taken into account.

41. Turning to chapter IX of the report, he said that, in a world characterized by constantly developing science and technology and growing interdependence, an activity carried out in the territory or under the jurisdiction of a State might cause harm or damage to other States. Any such activity, even if not prohibited by international law, should be regulated in accordance with the basic principles of international law, namely, State sovereignty, sovereign equality and the peaceful settlement of disputes. His delegation therefore attached great importance to the topic.

42. First and foremost, the definition of those activities prohibited by international law to which the draft would apply, as well as the scope of the instrument, must be clarified. Without such clarification, broad acceptance of the instrument would be in doubt.

43. His delegation concurred with the idea that States should take all appropriate measures to prevent or minimize the risk of causing harm or damage to other States. If harm was unavoidable, and if it actually occurred, the originating State should assume responsibility. It had been suggested that States should only take measures to prevent or minimize the risk of causing "significant" harm. If that criterion was adopted, the concept of significant harm must be carefully elaborated.

44. The requirement of prior authorization and consultations should be stipulated in the draft.

45. It was self-evident that compensation should be paid in the event that an activity caused actual harm or damage. The nature and extent of liability for such activity should also be clearly defined.

The meeting rose at 11.30 a.m.

United Nations A/C.6/54/SR.20

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Chairman: Mr. Kawamura (Vice-Chairman) ..... (Japan)

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Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*)

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99-81984 (E)

The meeting was called to order at 3.20 p.m.

Agenda item 155: Report of the International Law Commission on the work of its fifty-first session (*continued*) (A/54/10 and Corr.1 and 2)

1. **Mr. Lavalle** (Guatemala) said that, owing to both its theoretical and practical importance, the question of the jurisdictional immunities of States and their property had always been one of the most fiercely debated topics in international public law. While it had lost some of its significance with the end of the cold war, it should still be codified as had been diplomatic and consular relations and special missions, to which it was closely related. The absence of codification meant that the subject had been dealt with piecemeal in the domestic legislation of States and under customary law; the precise details of such provisions were not generally known, however, and that created a particular disadvantage for small countries, especially developing countries, which did not have the relevant legislation or jurisprudence.

2. For that reason, his delegation was grateful for the progress made by the International Law Commission's Working Group on that topic and for the excellent proposals it had put forward. He specifically commended the revised version of draft article 2, paragraph 1 (b), which appeared in paragraph 30 of the Working Group's report (A/54/10, annex). He had, however, some reservations about the phrase in square brackets in paragraph 2.1 (b) (ii) of that article, which raised the problem of the burden of proof. The problem might be rectified by indicating where necessary in the draft articles that, unless there was proof to the contrary, States were assumed for the purposes of draft article 2 to have acted in the exercise of their lawful powers.

3. His delegation also had reservations about the Working Group's suggestion that the difficult problem of choosing between the nature test and the purpose test in determining whether a contract or transaction was a commercial one should be settled either by deleting draft article 2.2, or by adopting the approach taken by the Institut de Droit International in its 1991 recommendations. In the latter instance, while the note by the Institut appended to the Working Group's report did mention commercial contracts, it was hard to see how national courts could base their judgements on a mere recommendation, particularly one coming from a private institution. The best wording was that suggested in footnote 42 of the Working Group's report, with just one amendment: in the last sentence "may" should be replaced by "shall" and a phrase should be added stating that the other party to the contract must be aware of the nature of the contract or transaction in question.

4. He could not see the point of the suggestion made in paragraph 80 of the Working Group's report, given that article 10, paragraph 3, which it would change, related to cases where the State enjoyed immunity from jurisdiction, whereas the suggested text related to just the opposite. In his view, it would be better to replace the paragraph in question with the text contained in footnote 74 of the Working Group's report; it should also be moved from Part III, where it did not belong, and incorporated in draft article 5.

5. With regard to contracts of employment, his delegation endorsed the proposals contained in paragraphs 105 and 106 of the Working Group's report. He did not, however, understand why in article 11, paragraph 2 (b), the Spanish and French versions contained the words "*candidato*" and "*candidat*" respectively rather than equivalents of the word "person", used in the English text. Lastly, in paragraphs 127 and 128, the bracketed word "only" should be deleted. In paragraph 129, he found alternative 1 to be the most persuasive.

6. **Mr. Chaturvedi** (India) said that the draft articles on the nationality of natural persons in relation to the succession of States were guided by several important principles: that nationality was essentially governed by internal law within the limits set by international law; that the implementation of the articles should be sensitive to the legitimate interests both of States and of individuals; that every person, including children, had the right to a nationality; and that, in matters of succession, statelessness should be avoided and, as far as possible, reduced. Part Two considered the specific categories of succession of States to which those principles could be applied. Article 3 provided an important clarification, namely that the draft articles applied only to cases of succession which were in conformity with international law and the Charter of the United Nations. The occupation of territory by force or any other exchange or separation of territories without the consent of third States was therefore outside the scope of the draft articles.

7. The presumption of nationality, covered in article 5, played an important role in the draft articles, which also stressed the right of option in article 11 to choose between the nationality of the predecessor or the successor State. Article 10 stated the obvious principle of loss of nationality in the case of voluntary acquisition of the nationality of another State. In that regard, the draft articles trod a delicate path, neither endorsing nor denouncing the right of States to grant or recognize dual or multiple nationalities. States

were also required to take measures to facilitate the unity of the family in cases where it might be affected by acquisition or loss of nationality under the law.

8. Part Two was generally satisfactory in adapting the implications of general principles to each of the categories of succession. It also provided, in the absence of entitlement to any other nationality, for acquisition of the nationality of the successor State in cases where a person had his or her habitual residence in a third State at the time of succession or had been born in or had any other appropriate connection with the territory of the successor State. In such cases, the emphasis was on the last habitual residence as a criterion, although not to the exclusion of other criteria, provided that they met the general obligation of non-discrimination imposed by article 15.

9. The draft articles would have a very useful role to play in guiding States in establishing State legislation on nationality, which was a requirement under draft article 6. Their status, however, was essentially one of guidelines, for they honoured the primacy of domestic law so long as the principles of non-discrimination, right of nationality and right of option were duly recognized, as required by international law.

10. His delegation endorsed the Commission's recommendations that the draft articles should be adopted by the General Assembly in the form of a declaration, which would give States the necessary flexibility in applying the principles contained therein and would avoid the long delay in entry into force that would arise if the text took the form of a convention.

11. Lastly, concerning chapter VII of the Commission's report, he commended the Commission for its efficiency in considering the issues outstanding: the concept of the State for purposes of immunity; the criteria for determining the commercial character of a contract or transaction; the concept of a State enterprise or other entity in relation to commercial transactions; contracts of employment; and measures of constraint against State property. His delegation had noted the useful suggestions made by the Commission and was confident that the Working Group, which was to meet shortly, would be able to achieve consensus on the basis of those proposals, thereby paving the way for the adoption of draft articles in a suitable and generally acceptable form.

12. **Mr. Blumenthal** (Australia) said that the Commission's Working Group was to be commended for the progress that had been made on certain contentious issues concerning jurisdictional immunities of States and their property. His delegation would not object to the Working Group's recommendation that paragraph 2 of article 1, concerning the criteria for determining the commercial character of a contract or transaction, should be deleted. In view of the different criteria apparently applied in different States, it would be necessary for the parties to a commercial transaction to come to an understanding in advance of the criteria. Since debate on the issue had never failed to elicit strongly expressed views, it was doubtful that a solution acceptable to all could be found on that point, a consideration to be borne in mind when contemplating whether to hold a diplomatic conference on the draft articles.

13. His delegation had some concerns about the proposals relating to State enterprises engaged in commercial transactions. First, there appeared to be some difference of interpretation between the text of article 10, paragraph 3, and the commentary in the Working Group's report. Although agreeing with the Working Group that State immunity should not apply in the circumstances indicated, his delegation felt that the principle set out in paragraph 3 had a broader meaning, namely, that the immunity of the State should not be affected by the transactions or activities of legally separate State enterprises. As it had indicated on previous occasions, his delegation felt that the principle should be applied more generally and not limited to commercial transactions, and should therefore appear in Part II of the draft.

14. With regard to measures of constraint and, in particular, to the various alternatives proposed by the Working Group, namely the deletion of those provisions or the introduction of a grace period, his delegation had always been of the view that immunity from execution should not be so extensive as to reintroduce the rule of absolute immunity. It would support the deletion of the existing provisions, which would have the effect of making execution of a judgement possible when a State was subject to the jurisdiction of the Court that had rendered it, but such a solution might be too sweeping to be accepted by all States. In that case, it could support alternative I, as contained in the Working Group's report. However, his delegation did not agree with the list of categories of excluded property contained in article 19, since it believed that property excluded from execution should be limited to government non-commercial property. Lastly, the suggestion put forward by the representative of the United Kingdom concerning the elaboration of a model law merited serious consideration. Australia would support the Commission's continuing work on that important topic.

15. On the question of nationality in relation to the succession of States (chapter IV) the Commission was to be congratulated on completing the draft articles on the

nationality of natural persons, on the excellent work accomplished and on the contribution it had made to the codification and progressive development of international law. His delegation supported the Commission's recommendation that the General Assembly should adopt the draft articles in the form of a declaration which would be of immediate practical benefit to States in the situations covered by the articles and would not preclude the possibility of elaborating a legally binding instrument at a later stage. A declaration would help to reduce or eliminate statelessness and would thus promote and protect the fundamental right of every individual to a nationality. In view of the political transitions taking place in so many parts of the world, including Australia's own region, the Commission's contribution was not only important but timely.

16. **Mr. Manongi** (United Republic of Tanzania) said that he had read with interest the report of the Commission's Working Group on Jurisdictional Immunities of States and their Property. Since the topic was of interest to all States, the codification of international law in that area demanded an evaluation not only of the legal principles and existing State practice but also of the interests of the international community as a whole. If there was to be a convention on State immunity, it would have to attract the support of the majority of States.

17. The provisions of article 2 were an important step in the right direction, and it was thus regrettable that the Commission had proposed eliminating portions of them. The controversy centring on the criteria for determining the commercial character of a contract or transaction could not be resolved simply by eliminating the provisions of the draft articles relating to the issue. A new decision to that effect would not be neutral, but would only perpetuate the status quo. The draft articles could not be silent on the issue of the criteria to be applied, since that was the crux of the debate. While not perfect, article 2 afforded a good basis for negotiation in that it sought to strike a fair balance between the nature and purpose tests and reflected variations in State practice. To refuse to allow the purpose test to be applied in addition to the nature test in some cases was to impose a practice far from enjoying broad recognition even among the members of the Sixth Committee.

18. It was unfortunate that the Commission, seeing no possibility for consensus, had been reduced to recommending the approach taken by the Institut de Droit International. The evolution of the concept of State immunity had been largely determined by a variety of national and regional instruments, which had restricted State immunity by stipulating several exceptions and had been chiefly invoked before the courts of the countries an regions in which almost all actions against foreign States ha been brought. If the process of codification was n supported by the Commission, it might take a long time t develop. It would also be disappointing if the Commissio did not seize the opportunity to take an approach th accommodated different points of view and divergen interests resulting from inequalities of development an differences in economic and political regimes.

19. With regard to article 11, concerning contracts o employment, his delegation felt that the distinction betwee acts *jure imperii* and acts *jure gestionis* could be valuabl However, the distinction between sovereign and commercia acts was more complex in relation to employment, for tw reasons. The first had to do with the context or the nature o the location of an embassy or diplomatic mission, which w viewed as an extension of the territory of the foreign Stat The second had to do with the subjective nature of th criteria to be applied in defending the position of a employee in an immunity case. The latter point was al relevant to the reworked version of paragraph 2 (a). It wou be helpful to create a distinction based on the employee place of work.

The meeting rose at 3.55 p.m.